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No. 22,108

IN THE

United States Court of Appeals
For the Ninth Circuit

Emmanual Blaz Mrkonjic-Ruzic, *Appellant,* vs. United States of America, *Appellee.*	

APPELLANT'S OPENING BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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IN THE

United States Court of Appeals

For the Ninth Circuit

EMMANUAL BLAZ MRKONJIC-RUZIC,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

An Indictment charging appellant with a violation of 18 USC §1001, false statement to an agency of the United States was returned on January 7, 1966, by the Grand Jury of the United States District Court for the Northern District of California, Northern Division, Sacramento. In substance, the Indictment charges defendant with knowingly giving false answers while under oath to questions asked of him in an Application to File Petition for Naturalization lodged by defendant at Sacramento on June 17, 1965.

Upon his plea of not guilty defendant was tried and convicted by a jury on March 15, 1967, before The Hon. Sherrill Halbert, United States District Judge.

On March 29, 1967, appellant was sentenced to the statutory maximum of 5 years imprisonment pursuant to 18 USC §4208 (c) and ordered sent for a 90 day study subject to modification in accordance with 18 USC §4208 (b).

Timely appeal was made.

APPLICABLE STATUTES

18 USC §6 Department and agency defined.

> "As used in this title:
>
> The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." June 25, 1948, c. 645, 62 Stat. 865.

18 USC §1001. Statements or entries generally.

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious

or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 749.

5 USC §101. Executive departments

The Executive departments are:

The Department of State
The Department of the Treasury
The Department of Defense
The Department of Justice
The Post Office Department
The Department of the Interior
The Department of Agriculture
The Department of Commerce
The Department of Labor
The Department of Health, Education, and Welfare
The Department of Housing and Urban Development
The Department of Transportation

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378; Pub. L. 89-670, §10(b), Oct. 15, 1966, 80 Stat. 948.

18 USC §1015. Naturalization, citizenship or alien registry

(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or

Shall be fined not more than $5,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 752.

STATEMENT OF FACTS

Adversary counsel in effectuating their respective roles at times develop polarized views and opinions as to the most efficacious manner of trial fact presentation. This case bears witness to such polarization.

On the one hand, government counsel's position is simple. Defendant signed an application for naturalization under oath. One particular answer among others was untrue.

The question was

> "Other names I have used are ....".

The directions supplied on the form of "Application to File Petition for Naturalization" were:

> "Print or type here any other name you have ever used, including maiden name".

The defendant typed in "None", crossed it out and typed in "Emmanuel Blaz Mrkonjic Ruzic". In answer to a previous question "My name is ...." the defendant had typed "Emmanuel Blaz Rusic".

Page 5 of the form of application then used contained the following admonition:

> "*Unless you answer* all *items in full,* it may be necessary to *return* the application to you". (Emphasis ours.)

The form now employed by the Immigration and Naturalization Service contains a warning:

> "Penalties: Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact."

At a hearing conducted under oath in Sacramento by Earl C. Bray, attorney for the Immigration and Naturalization Service, hereafter referred to as the Service, defendant denied the use of a name other than Emmanuel Blaz Mrkonjic Ruzic (RT 286, 291).

Ultimately defendant signed, under oath, a four page document in two parts, Form N-400 (Rev. 8-1-63) that is the basis of this Indictment.

Over a period of years, defendant in fact had used many names. Among them are Manuel Blaz Ruzic (RT 34) used in his so-called *Curriculum Vitae* for Stanford University where he was a graduate student. To an investigator for the Service in a so-called Private Bill Unit hearing, John Ruggiero of New York City, defendant, gave the name Manuel Blaz Ruzic (RT 65), the family name Bojanic (RT 105) and Emanuel Blaz Rusic (RT 105). With Father Thomas J. Malone of the Maryknoll Fathers, while defendant was a seminarian, he was known alternately as Bojanic and Ruzic (RT 206, 207). To Charles Bergerson of the Voice of America where the defendant worked intermittently he used both Bojanic and Ruzic (RT 234, 244 and 258).

When examined in Dallas, Texas, by Donald C. Mock of the Service's Travel Control, at a time when defendant was a student at Texas Christian University, he used Ruzic (RT 423) and Ignatius Bojanic (RT 431). The government file also revealed that when admitted into the country he affected Cherubim Ruzic, Dr. Emmanuel Mozart and L'Abbe Blaz Mrkonkic Ruzic (RT 434).

When defendant took the stand he admitted the use of Blaise C. Ruzic (RT 535), Ignatius Bojanic (RT 543), Professor and Reverend Emmanuel B. Ruzic (RT 597), E. B. Roseman (RT 612) and Reverend Blaz Mrkonjicruzic (RT 628). He also received mail from Yugoslavia under another name, Kraljich (RT 657).

The story of how defendant came to use these names is involved but interesting. Using defendant's recitation as the basis or frame, reference will also be made to the government's case where the same or similar material was presented.

Defendant was born in Yugoslavia, in the part known as Croatia in 1930 (RT 444). He, and his family moved to Zagreb and at age 19 he entered the theological seminary affiliated with the University of Zagreb (RT 446). As the result of local civil disorders, he and other seminarians were arrested and detained for a three month period in 1951 (RT 447). He fled Yugoslavia in 1952 (RT 449) passing through Italy (RT 449) en route to Paris, France.

While in Paris he was hospitalized for TB (RT 450) and was a student at several seminaries (RT 248, 249). Leaving France in 1953 (RT 249, 250), he went to Caracas, Venezuela (RT 451) and ultimately arrived in Canada (RT 248-250). As a student, he entered the USA in August, 1954 (RT 247) where he enrolled at Catholic University, Washington, D.C. (RT 459-460).

Periodically he would return to Canada and on one of his trips, and while a guest at a convent at Sherbrook, he purloined the transcript of grades and studies, known in Yugoslavia as an Index, from a nun named Sister Ignatius or Matija Bojanic or Sister Ignacija (RT 460, 461, 139, 140). He denied stealing the Index, saying that the sister gave it to him to translate. He did not know what happened to the original (RT 620, 621). The Index was altered, translated into English and used by defendant as his own wherever he enrolled as a student in the USA whether it was Catholic University, Abiline Christian, Texas Christian, University of California or Stanford. From and through the use of the Index he arrogated to himself the names Ignatius and Bojanic.

Present at the private bill hearing in New York City conducted by Mr. John Ruggiero of the Service was a Maryknoll priest, a Father John McGovern, whose subsequent letter to Father Malone reviews defendant's life up to January, 1968 in a most derogatory fashion. Beginning at page 244 and continuing through page 255 of the transcript is the record of Ruzic's failures as a seminarian in Paris, Canada and the USA, his use of the forged Index, his religious vacillations between the Catholic and Lutheran faiths, his various jobs and his manipulation of others for his benefit.

After either being expelled from or voluntarily leaving the Maryknoll Fathers (RT 205) on January 16, 1958, he returned to Canada (RT 117) only to return to Abiline, Texas in March, 1958, to Dallas, Texas (RT 484).

Ruzic was deported, or in lieu left voluntarily, to go to Canada (Exhibit 15) via Buffalo, New York in the latter part of 1958 (RT 485, 486). Upon being refused readmittance at Buffalo in January, 1959 (RT 486) he surreptitiously reentered through Hamilton, Ontario and Detroit and returned to Dallas (RT 486). Apart from a California sojourn at Sequoia National Park where he worked in the summer of 1959 (RT 487, 488) he remained in the Dallas area as a student at Texas Christian University (RT 489-493) receiving permanent resident status in May, 1960 (RT 493).

Ruzic ultimately came to San Francisco (RT 494), lived in Monterey during the summer of 1960 (RT 497), in the fall of 1960 at Palo Alto (RT 320, 498), enrolled and was a teaching assistant at the University of California during most of 1961 (RT 321, 499-501). After acceptance as a student at Stanford, defendant lived in Palo Alto from the spring of 1962 up to the spring of 1964 (RT 321, 502-509) ultimately receiving a Master's degree from Stanford.

From these peregrinations one may properly doubt if Ruzic ever was a seminarian in Yugoslavia. But in any event, building upon the use of a false name, Ignatious Bojanic, and a false set of student documents taken from a Croatian nun, defendant came a long way. To offset these undisputed and unsavory facts, defense counsel, William Lally, formerly Assistant United States Attorney, sought to establish through the enormity of the file in the Service's possession that no government official was in fact deceived, despite Ruzic's admittedly untrue answers at his Sacramento hearing and elsewhere.

Mr. Lally began to execute his plan immediately after the jury was selected, countering government counsel's opening statement with one of his own in which he accused the government of bad faith and trickery (RT 24). While the Court was critical of his conduct (RT 28) its remarks were restrained (RT 28-30).

Later defense counsel used the word "snatch" to characterize action by the United States attorney, which brought on a mildly critical exchange between the Court and counsel (RT 46).

Defense counsel sought to raise a *Miranda* type objection as to evidence of the New York City Private Bill investigation conducted by Mr. Ruggiero for the Service but did not get very far (RT 69).

A more vitriolic exchange occurred between the Court and counsel (RT 82), which can be denominated feisty on the part of defense counsel.

Later on that same trial day, another rather heated exchange between the Court and counsel occurred over counsel's request to see the Service's voluminous Ruzic file (RT 115-117).

Another exchange begins on page 234 where Mr. Lally snidely characterized as "kindly" the turning over to him of some lengthy documents regarding Mr. Ruzic's early American career. By this point of time the Court has a view of Mr. Ruzic and his activities that is at odds with defense counsel's attempts in his opening statement to make out his client as "lily white", RT 238, and the Court said so in a no uncertain but restrained fashion (RT 239-240).

Faced with the necessity of laying a foundation requisite to the admission of a document, government counsel inquired if the requisite foundation could be waived (RT 277). Defense counsel responded in querulous fashion that "Mr. Lally waives nothing". Aptly, the Court described this attitude as "unreasonable" as well it was.

At the conclusion of the testimony of the government witness, the Court ordered defense counsel to do all of his foundational cross-examination or be precluded from raising the issue (RT 279). Again the language of the Court was firm but temperate. It would brook no trifling.

Because government counsel kept repeatedly drawing forth documents from a file on his table and offering them in evidence, one at a time, defense counsel asked that the whole file be admitted and that he be permitted to examine it in detail (RT 362). The Court told him to stop—that he could put his own case in later—Lally persisted—again the Court stopped him (RT 363) but without acrimony, merely with asperity and shortness.

A witness from the California State Department of Education, a Mr. Price, brought to court an Application for Teaching Credentials and associated documents to the effect that as late as 1965, defendant continued to use the altered Index of Sister Ignacija Bojanic as his own (RT 363-384). After prolonged colloquy over admissibility and foundation, the Court strongly admonished defense counsel for constantly, through the office of cross-examination, trying his case before it was his turn (RT 373).

But if the Court leaned on defense counsel at every possible opportunity with varying weight, consider the holocaust unleased at Mr. Lally for 5 pages of transcript. (RT 435-440.) This outburst actually was begun when defense counsel objected to the prosecutor employing the phrase "sneaked back in" to characterize Ruzic's return to the USA through Detroit rather than through Buffalo, his exit port (RT 435). In the presence of the jury, the Court was bitingly critical of Mr. Lally, telling him that he was trying to testify himself (RT 436), telling the jury to pay no attention to the lawyers (RT 436) and then once the jury was excused really letting defense counsel have it right between the eyes. Lally was severally accused of baiting the Court (RT 437), trying his case by innuendo (RT 437), and because of his skill, intentionally doing things to disrupt the normal court procedure (RT 438). The Court criticized defense counsel for not standing while objecting and for making a speech (RT 439). This language would be enough to cow all but the toughest defense lawyer in criminal cases.

But its worst effect, was in telling the jury "not to pay attention to these lawyers" as if to say to the jury that defense counsel was caviling with them to hide from them the truth. Such a characterization could only have substantially injured whatever chances with the jury Ruzic might have had.

Ruzic's cross-examination was devastating. He admitted that he might have claimed falsely to have studied in Rome (RT 541), not telling about all the places at which he had studied (RT 541, 570), exaggerating years, courses taken, and grades received at some places of study (RT 542, 543), using the purloined name of Bojanic (RT 546), using Sister Bojanic's Index as late as 1961 (RT 551), at the University of California as his own (RT 541, 570). Ruzic also admitted giving Sister Ignacija's records to Texas Christian as his own (RT 551), showing them to the Maryknoll Fathers (RT 551), showing giving them to Catholic University (RT 552), and claiming an academic degree never awarded to him (RT 554).

Ruzic was forced to admit that in every instance of entering a school or university using his false credentials, he was unable to perform, lacked the claimed background and failing in his studies (RT 558). He also admitted to giving false background information when seeking employment from the Voice of America (RT 579), falsely claiming to have studied at the Sorbonne in Paris (RT 582), and falsely claiming to have worked in Paris for UNESCO when applying for a teaching position at Great Falls College (RT 586, 587). The final clincher was having to admit that he had never presented himself in this country in a true, honest, and correct fashion. (RT 589.)

While cross-examination went on for 100 more pages, it was just more of the same false representations (RT 590 to 692), including grade tampering at TCU (RT 599), even to having to admit that what purported to be his own transcript, received from Yugoslavia was the same as Sister Bojanic's Index

(RT 623-624). To further accentuate the obvious, Ruzic was finally forced to admit that he was untruthful to the Service when he failed to inform the Service of his voluntary return to Canada to escape deportation (RT 627). So that anything done by way of rehabilitation on redirect examination was probably for naught. The jury had heard too much.

Obviously, as a matter of hindsight, this was no case to try before a jury. The Government, as usual, had too much evidence. But defense counsel was entitled to a break better than he got, as was Ruzic. Again, hindsight dictates a law attack and at best a court trial. But who knows now what was best?

ISSUES

First: According to applicable statutes and cases, the Immigration and Naturalization Service of the Department of Justice is a department of the United States within the meaning of 18 USC § 1001.

Second: According to general precepts of statutory construction, 18 USC § 1001 is a general statute and 18 USC § 1015(a) is a special statute dealing with immigration matters. There is a difference of language particularly as to penalty. The question to be resolved is whether the appellant is properly charged?

Third: Assuming that defendant is properly charged, is a simple "no" or "none" or even one name answer to a question in a questionnaire so deceitful and fraudulent as to be a violation of the statutes.

Fourth: The Court prejudiced the jury against defendant by his constant attacks upon defense counsel.

LAW

FIRST: ACCORDING TO APPLICABLE STATUTES AND CASES, THE IMMIGRATION AND NATURALIZATION SERVICE OF THE DEPARTMENT OF JUSTICE IS A DEPARTMENT OF THE UNITED STATES WITHIN THE MEANING OF 18 U.S.C. §1001.

According to 5 USC § 101, 18 USC § 6 and *U.S. v. Germaine,* 1878, 99 US 508, 510-511, the Justice Department is a department of the United States within the meaning of 18 USC § 1001 so that a false or fraudulent statement made by an accused to an officer of the Justice Department is ordinarily actionable. *Haddad v. U.S.,* 9th Cir. 1965, 349 F 2d 511.

SECOND: ACCORDING TO GENERAL PRECEPTS OF STATUTORY CONSTRUCTION, 18 U.S.C. §1001 IS A GENERAL STATUTE AND 18 U.S.C. § 1015(a) IS A SPECIAL STATUTE DEALING WITH IMMIGRATION MATTERS. THERE IS A DIFFERENCE OF LANGUAGE PARTICULARLY AS TO PENALTY. THE QUESTION TO BE RESOLVED IS WHETHER THE APPELLANT IS PROPERLY CHARGED.

The provisions of 18 USC § 1015(a) relate to false or fraudulent statements, either oral or written, made by applicants or petitioners to the Service. 18 USC § 1001 applies to all federal instrumentalities.

There is a variance between the two sections as to penalty. § 1001 provides up to 5 years in prison or a fine up to *$10,000* or both. § 1015 is a 5 year *$5,000* statute. By its terms, it is thus more favorable to defendant than § 1001, one of the criteria employed by courts in determining legislative intent. Given a choice between two possibly applicable statutory schemes, a specific statute must be charged rather than one of more general scope.

Illustrative of this principle are the following quotations from American Jurisprudence:

50 Am. Jur., Statutes, § 6, p. 19,

> "A law is a general one where it relates to persons, entities, or things as a class, or operates equally or alike upon all of a class, . . .".

§ 7, pp. 21 and 22,

> ". . . (A) statute is regarded as a 'special law' if it does not have a uniform operation . . . (or) if it relates to particular persons . . . of a class, . . . either particularized by the express terms of the act . . . from the whole class to which the law might, but for such limitations, be applicable".

§ 367, p. 371,

> ". . . (W)here an act contains special provisions they must be read as exceptions to a general provision . . . in the same statute . . . (and) where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision".
>
> *Clifford F. MacEvoy Co. v. U.S.*, 322 US 102, 107.

THIRD: ASSUMING THAT DEFENDANT IS PROPERLY CHARGED, IS A SIMPLE "NO" OR "NONE" OR EVEN ONE NAME ANSWER TO A QUESTION IN A QUESTIONNAIRE SO DECEITFUL AND FRAUDULENT AS TO BE A VIOLATION OF THE STATUTE?

To be actionable either under 18 USC § 1001 or 18 USC § 1015, the declaration or statement must be material in that it would bear on the decision making process of a department or agency. *Brandow v. U.S.*, 9th Cir. 1959, 268 F 2d 559, 562 and 564, or the Immigration and Naturalization Service, *Dear Wing Jung v. U.S.*, 9th Cir. 1962, 312 F 2d 73, *U.S. v. Udani*, D. C. Cal. 1956, 141 F Supp. 30, and *U.S. v. Bridges*, D. C. Cal. 1949, 86 F Supp. 922.

Attention will now be directed to two lines of authority in the federal courts that deal with the simple negative response. One line holds that a denial or negative response is within § 1001. Examples are *U.S. v. Blake*, D. C. Mo. 1962, 206 F Supp. 706, *U.S. v. Glarraputo*, D. C. N. Y. 1956, 140 F Supp. 831, cf. *U.S. v. Adler*, 2nd Cir. 1967, 380 F 2d 917, 922. The other line holds that a negative response is not a statement or report within the ambit of § 1001. It is exemplified by *Paternostro v. U.S.*, 5th Cir. 1962, 311 F 2d 298, 305 and 309, *Friedman v. U.S.*, Mo. Cir. 1967, 374 F 2d 363, *U.S. v. Davey*, D. C. N. Y. 1957, 155 F Supp. 175, 176, *U.S. v. Stark*, D. C. Md. 1955, 131 F Supp. 190, 199, *U.S. v. Philippe*, D. C. S. D. N. Y. 1959, 173 F Supp. 582, and *U.S. v. Allen*, D. C. S. D. Cal. 1961, 193 F Supp. 954.

These divergent views pivot upon whether the governmental agency to whom the false report or statement was made is an investigational agency or one that can act independently upon the supplied false information and whether "no" or "none" by ordinary language usage is a "statement or report" within the meaning of § 1001 or § 1015. Perhaps there was also some humanity in the liberal line represented by *Paternostro,* ante, and *Allen,* ante, in that the defendant is given the benefit of a strict and narrow statutory construction.

FOURTH: THE COURT PREJUDICED THE JURY AGAINST DEFENDANT BY HIS CONSTANT ATTACKS UPON DEFENSE COUNSEL.

The repeated "leans" by the Court, increasing in intensity as the trial progressed, when coupled with other specified error, cumulatively denied to defendant his right to a fair trial. *U.S. v. Guglielmini,* 2nd Cir. 1968, 384 F 2d 602.

Dated, San Francisco, California,
June 18, 1968.

Respectfully submitted,
Gregory S. Stout,
Attorney for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Gregory S. Stout,
Attorney for Appellant.

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Dated, San Francisco, California,
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Respectfully submitted,
Gregory S. Stout,
Attorney for Appellant.

Certificate of Counsel

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Gregory S. Stout,
Attorney for Appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMANUAL BLAZ MRKONJIC-RUZIC, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	)	NO. 22108

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMANUAL BLAZ MRKONJIC-RUZIC, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22108 BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from a judgment of conviction in the United States District Court for the Northern District of California, Northern Division (Sacramento), for violation of Title 18 U.S.C. § 1001.

Jurisdiction in the District Court was predicated upon Title 18 U.S.C. § 3231. Jurisdiction in this Court is invoked under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Proceedings Below

On January 7, 1966, an indictment was filed in the United States District Court for the Northern District of

California, Northern Division, charging appellant, Emmanual Blaz Mrkonjic-Ruzic, with violation of Title 18 U.S.C. § 1001. Particularly it was charged that Ruzic concealed and covered up material facts and made false and fraudulent representations concerning prior use of names other than his true name in an application to file a petition for naturalization with the United States Immigration and Naturalization Service.

Ruzic was found guilty on March 15, 1967, after a trial by jury. On March 29, 1967, he was sentenced to imprisonment for a term of 5 years under the provisions of Title 18 U.S.C. § 4208(b) for the 90 day study under § 4208(c).

Notice of Appeal from this judgment of conviction was filed on March 29, 1967. On March 26, 1968 this Court ordered the appeal dismissed for lack of prosecution. That order was subsequently set aside on the motion of counsel for the appellant, and Appellant's Opening Brief was filed.

Statement of the Facts

Ruzic, a native of Yugoslavia, entered the United States on a student visa in August of 1954.[1/] On June 17, 1965 he

1/ Reporter's Transcript, p. 459

applied for naturalization in Sacramento, California.2/ In connection with that application, he denied under oath, both orally and in writing, the prior use of any other names.3/

Although the evidence showed the prior use of various names by Ruzic, the prosecution was principally concerned with his use of the name Ignatius Bojanic. It was the failure to disclose the prior use of that name which effectively concealed and covered up the fact that Ruzic had repeatedly defrauded colleges, churches, and governmental agencies by fraudulently appropriating the name and academic identity of a Yugoslavian nun then residing in Canada. The nature and magnitude of his fraudulent practices was shown by the testimony of the numerous witnesses and massive documentary evidence introduced by the Government at trial.

This pattern of continued deception would have been relevant and material to an evaluation of Ruzic's good moral character, a duty imposed by statute upon the naturalization examiner, the officer to whom the false and concealing statements were made.4/

2/ Reporter's Transcript, p. 284
3/ *Id.*, p. 291 and Government's Exhibit 41
4/ *See* Title 8 U.S.C. §§ 1427(a)(3), (e) and 1446(b)

ARGUMENT

I. IT WAS NOT ERROR TO CHARGE APPELLANT UNDER TITLE 18 U.S.C. § 1001 RATHER THAN TITLE 18 U.S.C. § 1015(a).

Ruzic argues that he should have been prosecuted under Title 18 U.S.C. § 1015(a),[5] which he contends is a special offense controlling over § 1001[6] under which he was charged. Such an argument could be considered only where

---

5/ Title 18 U.S.C. § 1015(a) reads as follows:

> "(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens;
>
> * * *
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

6/ Title 18 U.S.C. § 1001 reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

both statutes relate to the same criminal act. Where the so-called general statute proscribes conduct which is not covered by the so-called special statute, the Government is not required to charge under the latter. Conerly v. United States, 350 F.2d 679 (9th Cir. 1965).

The two statutes involved here do not relate to the same criminal conduct. Section 1015(a) proscribes only the making of a false statement under oath. Section 1001, on the other hand, proscribes the willful concealment or covering up of a material fact, as well as the use of false statements (whether or not under oath). Thus, the gravamen of the offense committed by Ruzic could not have been charged under § 1015(a). The Government was entitled to and did rely heavily on Ruzic's concealment and covering up of material facts in obtaining the conviction in this case.

Moreover, since Ruzic did not assert this contention in the District Court, it may not be raised for the first time on appeal in the absence of a manifest miscarriage of justice or plain error seriously affecting the fairness of the proceedings below. See Billeci v. United States, 290 F.2d 628 (9th Cir. 1961); Herzog v. United States, 235 F.2d 664 (9th Cir. 1956); and cf. Conerly v. United States, supra.

The only prejudice which Ruzic claims to have resulted from his being charged under § 1001 instead of § 1015(a) is that §1001 carries a greater maximum fine -- both statutes carry the same maximum term of imprisonment. Where error is alleged in charging a defendant under a section carrying a greater penalty than that under which he should have been charged the proper remedy is to reduce the sentence to eliminate the excessive portion. See Robbins v. United States, 345 F.2d 930, 933 (9th Cir. 1965). Here, therefore, since Ruzic received no fine, any error in charging him under § 1001 was harmless.

II. APPELLANT'S NEGATIVE RESPONSES CONSTITUTED VIOLATIONS OF TITLE 18 U.S.C. § 1001.

Ruzic argues that his representations that he had never used another name constituted mere denials or negative responses and as such were not prohibited under § 1001. This contention not having been raised in the District Court is also presented for the first time on appeal.

In support of this contention, appellant relies upon the so-called "exculpatory no" cases. The reasoning of those cases has been rejected by this Court in Brandow v. United States, 268 F.2d 559, 564 (9th Cir. 1959), and by

the Second Circuit in United States v. Adler, 380 F.2d 917, 922 (2nd Cir. 1967), wherein the Court said:

> "In only the so-called 'exculpatory no' cases have the courts shown a reluctance to extend § 1001 'to cover the investigation of criminal conduct,' Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Philippe, 173 F.Supp. 582 (S.D. N.Y. 1959); United States v. Davey, 155 F.Supp. 175 (S.D. N.Y. 1957); United States v. Stark, 131 F.Supp. 190 (D. Md. 1955); United States v. Levin, 133 F.Supp. 88 (D. Colo. 1953). As stated in Stark, supra, 131 F.Supp. at 207:
>
> > The 5th Amendment provides that no person shall be compelled to be a witness against himself in criminal cases. While not strictly applicable here the construction of section 1001 here sought by the government seems inconsistent with this great bulwark of individual liberty.
>
> "However, even this exception to the application of § 1001 was rejected by the Ninth Circuit, Brandow v. United States, 268 F.2d 559 (9th Cir. 1959), and has not been adopted in this circuit. See, United States v. McCue [301 F.2d 452 (2nd Cir. 1962)]. See also, United States v. Van Valkenburg, 157 F.Supp. 599, 17 Alaska 450 (D. Alaska 1958)."

There is no sound reason to exclude false statements from the purview of § 1001 simply because they involve negative, rather than affirmative, responses to questions. In United States v. Blake, 206 F.Supp. 706, 708 (W.D. Mo. 1962) the Court held:

> "Negative responses to inquiries by government agencies have been held to violate Section 1001 in Pitts v. United States (C.A. 9) 263 F.2d 353, cert. den. 360 U.S. 935, 79 S.Ct. 1457, 3 L.Ed. 2d 1547, reh. den. 361 U.S. 857, 80 S.Ct. 47, 4 L.Ed. 2d 97; United States v. De Lorenzo (C.A. 2) 151 F.2d 122; United States v. Giarraputo (E.D. N.Y.) 140 F.Supp. 831. Furthermore, the words of the statute clearly cover negative answers in that the statute expressly applies to anyone who 'conceals or covers up * * * a material fact * * *.' For these reasons, the contention that a negative answer cannot be made the basis of a prosecution under Section 1001 cannot be sustained."

Moreover, the authorities upon which appellant relies involve false responses to questions propounded by agencies such as the Federal Bureau of Investigation during the course of an investigation. Under those circumstances, some courts have held that the matter was not "within the jurisdiction" of the investigative agency within the meaning of § 1001. See Friedman v. United States, 374 F.2d 363

(8th Cir. 1967); United States v. Davey, supra; and United States v. Stark, supra. In Friedman, the Court held that, "Jurisdiction means the right to say and the power to act." (374 F.2d at 367), and added that, "When the false statement is made to the agency with the power to allow the privilege or grant the award, jurisdiction of the agency is established so as to warrant a prosecution under § 1001." (374 F.2d at 369).

In the present case, the naturalization examiner was not acting merely as an investigator without jurisdiction to make a decision or recommendation. On the contrary, he was required under the provisions of Title 8 U.S.C. § 1446(b) to conduct a preliminary examination upon appellant's petition and to make recommendations thereon to the Court.

Thus, we submit that even those courts which follow the reasoning of the "exculpatory no" cases would not apply that exception to the present case. In Paternostro, supra, the Court emphasized that the appellant in that case had not deliberately initiated any positive or affirmative statement calculated to pervert the legitimate functions of Government (311 F.2d at 305). In the present case, Ruzic did just that. The Immigration and Naturalization Service did not approach

him seeking information; he approached the Service seeking the high privilege of becoming a citizen of the United States. His false representation was not made merely to exculpate himself from potential criminal prosecution; it was made for the calculated purpose of fraudulently inducing the agency to act favorably upon his application for citizenship. As the Court observed in United States v. Adler, supra:

> "In any event, the 'exculpatory no' cases are readily distinguishable from this case where appellant made an affirmative, voluntary statement deliberately intented to provoke agency action. See, Paternostro, supra; Philippe, supra; Stark, supra."

III. APPELLANT RECEIVED A FAIR TRIAL.

Appellant contends that the trial Court prejudiced the jury against him by constant attacks upon defense counsel. We submit that the Court's remarks to defense counsel were not unjustified and, as shown by appellant's Statement of the Facts, were for the most part brought about by the deliberate provocation of defense counsel at trial.

Furthermore, most of the exchanges to which counsel for appellant refers took place outside the presence of the

jury. Particularly, the Court excused the jury prior to the colloquy which counsel terms a holocaust (Appellant's Opening Brief, p. 11),7/ prior to the Court's admonition to defense counsel against trying his case out of turn,8/ and prior to the Court's reference to defense counsel's statement characterizing Ruzic as "lily white."9/ The remaining comments, made in the presence of the jury, were not only justified but, we submit, appropriate, if not necessary, in order for the District Judge to keep defense counsel in line and thereby assure an orderly and fair trial for both the defendant and the Government. Cf. Inland Freight Lines v. United States, 191 F.2d 313, 316 (10th Cir. 1951).

Moreover, the Court instructed the jury:

> "If the Court has at any time during the trial asked any questions, made any ruling, used any language or done anything which seemed to you to indicate the opinion of the Court as to any question of fact, you must not be influenced thereby, but must determine for yourselves all question of fact, without regard to any opinion you may suppose the Court may have or entertain. The question of the guilt or innocence of the defendant is for you alone, regardless of

---

7/ Reporter's Transcript, p. 436
8/ Id., pp. 369, 373
9/ Id., pp. 235, 238

what the Court or anybody else may think about it.

"To state the matter in another way, let me say that I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not established; what inferences should be drawn from the evidence; or any opinion concerning the guilt or innocence of the defendant. If any statement, expression or act of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."10/

We submit that appellant received a fair trial.

CONCLUSION

For the foregoing reasons, we urge that the judgment below be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By William B. Shubb
WILLIAM B. SHUBB
Special Assistant to the
United States Attorney

10/ Reporter's Transcript, p. 864

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William B. Shubb

WILLIAM B. SHUBB
Assistant United States Attorney

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief for Appellee was this date mailed to Gregory S. Stout, 220 Montgomery Street, San Francisco, California 94104, Attorney for Appellant.

DATED: September 9, 1968

WILLIAM B. SHUBB

Subscribed and sworn to before me this 9th day of September, 1968.

DEPUTY CLERK, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA

No. 22109
22109A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WALDEMAR THOMSON, IONE THOMSON and TRUSTEES OF AERO SALES CO, dissolved,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF IN PETITION FOR REVIEW

WALDEMAR THOMSON
605 S. Normandie Avenue
Los Angeles, California 90005

In Propria Persona, for Petitioners

No. 22109
22109A

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TOPICAL INDEX

APPENDICES

TABLE OF AUTHORITIES

No. 22109
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IN THE

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PETITIONERS' BRIEF IN PETITION FOR REVIEW

JURISDICTION

Jurisdiction is conferred upon this Court by:

1. The residence of petitioners within its jurisdiction.
2. The filing of petitioners' returns within its jurisdiction.
3. By timely filing of Notice of Petition for Review.

4. By Sections 7482 and 7483 of the Internal Revenue Code (USCA 26).

GRAVAMEN OF PETITIONERS' PETITION

I

The ex post facto application of a decision subsequent to impose tax upon punitive damages recovered in a settlement completed in March, 1955 is a violation of the due process clause of the 5th Amendment.

Obear Nester Glass Co., 20 TC 1102

Untermeyer v. Anderson, 276 U.S. 440;

Nichols v. Coolidge, 274 U.S. 531, 542.

II

The impost of tax upon recovery of capital in amount less than the "basis," is a violation of ruling case law.

Telefilm, Inc. 21 TC 688, 699 (1954).

III

The impost of tax, after refusing to hear an offsetting loss resulting from the very same acts and taken in the same year, is a violation of ruling case law.

Slater v. Commissioner,
356 F.2d 688, 670.

IV

The impost of tax upon "dividends" that are pure "fictions of law" is a violation of ruling case law.

Stout v. Commissioner,
273 F.2d 345, 4th Cir. 12/29/59.

SUMMARY OF SPECIFICATIONS OF ERROR

I

The determination of the Commissioner is wrong on its face and not entitled to any presumption of correctness. At the outset of the trial on December 7 and 8, 1964, it became clear that burden had shifted heavily on Commissioner but was not discharged.

II

Although burden had clearly shifted heavily upon Commissioner early in the trial, the tax court continued to impose burden upon petitioners through TCM 1965-237.

III

The determination of the Tax Court is wrong on its face, is entitled to no presumption of conclusiveness.

IV

Denial of rehearing, denial of motion for reconsideration of said denial, setting cause under Rule 50 and denial of petitioners' Motion on September 14, 1966 was prejudicial error.

V

The facts in Glenshaw Glass case are clearly distinguishable from facts herein. 348 U.S. 426.

VI

The Tax Court avowed prejudice against petitioners.

VII

There are at least two errors of fact in TCM 1965-237.

VIII

Calculations under Rule 50 are wrong.

STATEMENT OF THE CASE

This case revolves around two issues:

ISSUE NUMBER I

The misapprehension of fragmental and incompetent evidence and the misapplication of law to impose tax upon Aero Sales Co. on $1, 182 proceeds of settlement of two law suits together with the misapplication of Rule 50 to reimpose tax on Thomsons on said $1, 182 as "dividends."

ISSUE NUMBER II

The misapprehension of facts and the retrospective misapplication of law to impose tax upon Aero Sales Co. on $11,330. 33, allotted to it, and upon T. T. Co. on $36, 356.22, allotted to it, out of a $47, 686.55 settlement; the misapplication of Rule 50 to reimpose tax upon Thomsons on said $11, 330. 33 as "dividends"; the misapplication of law to convert said $47, 685.55, recovered as a partial return of a capital loss of $173, 500.00, clearly suffered, into $48, 555. 36 of taxable ordinary income.

It was a denial of "due process" to refuse petitioners' motion for rehearing then to set cause for hearing under Rule 50 and preclude petitioners from proof.

Knight Newspapers v. Commissioner,
143 F.2d 1007, 6th Cir. 7/24/44.

ARGUMENT

As stated in Lasky v. Commissioner, 235 F.2d 97, 9th Circuit: "the Tax Court is not a court at all." In petition herein a Court is available to petitioners for the first time.

ISSUE NO. I

As stated in Stout v. Commissioner, 273 F.2d 345, 350, 4th Cir. Dec. 29, 1959. The presumption of correctness is procedural -- but disappears -- when substantial evidence to the contrary is introduced. Respondents' "11th hour discovery" and presentation of fragmental incompetent evidence was overcome by petitioners evidence, RT p. 100 and 101.

Manchester Paper Box v. Commissioner, 89 F.2d 315.

ISSUE NO. II

In Obear Nester Glass Co., 20 TC 1102, 1109, 9/30/53 the court said:

> "The real controversy is the extent, if any, to which proceeds of the lump sum settlement is non taxable because it constitutes punitive damages under the treble damage provisions of the anti trust acts. Reasonable stability of the law

makes it highly desirable that recognized judicial precedents be adhered to."

Obear Nester Glass Co. found two thirds of settlement to be non taxable punitive damages.

Glenshaw Glass Co., 18 TC 860;

Wm. Goldman, 19 TC 637;

Highland Farms, 42 BTA 1314;

Raytheon Production, 1 TC 952;

Central R.R., 79 F.2d 697.

Thus, on the day settlement was completed in March, 1955, punitive damages were non taxable by law established, over 2 decades, by uniform decision of the courts. On said established law petitioners were entitled and obliged to rely in making the settlement. The ex post facto application of a decision 90 days subsequent is a violation of "due process" clause of 5th Amendment.

Cohan v. Commissioner, 39 F.2d 540, 545.

He (Cohan) is a different case from that of one who, when he takes action, has no reason to suppose that any transaction of the sort will be taxed at all.

Untermeyer v. Anderson, 276 US 440;

109 U. of P. LR 74;
Nichols v. Coolidge,
274 US 531, 542;

Milliken v. U.S,
75 L.Ed 809, 815;

Blodgett v. Holden,
275 U.S. 142, 147;

Bouie v. The City of Columbia,
378 U.S. 347;

Gray-Limitations of Taxing Power;
1906, Sec. 1828.

In Telefilm Inc., 21 TC 688 (1954) 699 the court said:

> "Some basis for allocation is found in the verdict of the jury in the original law suit awarding the company $250,000 as compensatory damages and $50,000 as punitive damages. Using this basis as the most reasonable available we find that 1/6 of the net proceeds represented non taxable punitive damages."

By his rulings in Aero v. Columbia the court was bound to instruct the jury and the jury bound to restrict itself to a verdict of return of capital.

Durkee v. Commissioner,
162 F.2d 184, 186;

"But where the settlement represents damages for lost capital rather than lost profits the money received is a return of capital."

Ralph Freeman,
33 TC 330;

However if the recovery received is as a replacement of capital destroyed or injured the money received is a return of capital and not taxable.

Raytheon Prod. Co.,
144 F.2d 110, 113;

Nicholas Mathey,
10 TC 1099 affd 177 F.2d 259;

H. Liebes and Co. v. Commissioner,
90 F.2d 932, 935.

Recovery for injury to capital is never income no matter when collected.

U.S. Safety Car Heating Co.,
297 U.S. 88, 98;

Farmers and Merchants Bank v. Commissioner,
59 F.2d 912, 913;

Strother v. Commissioner,
55 F.2d 626, 632;

This is a Court of Equity as well as a Court of Law.

Collins v. Commissioner,
32 F.2d 753, 754.

"The Statute lacks the provision common to Statutes dealing with fact finding agencies, that the findings of fact shall be conclusive, if supported by evidence. The absence of such provision from the Statute gives some support to the view that the power of review is in equity.

Helvering v. Taylor,
293 U.S. 508.

The tax payer introduced substantial evidence that no tax is due.

CONCLUSION

Considering the above, petitioners respectfully request the Court hold:

1. That \$31,791.03 out of \$47,686.55, was in March, 1955, non taxable punitive damages.
2. That \$15,895.52, out of \$47,686.55, was, in March, 1955, non taxable return of capital.
3. That \$11,330.22 was in 1955 not dividends taxable to Thomsons.
4. That Commissioner has failed to prove that \$1,182.00, in 1954, was ordinary income.
5. That \$1,182.00, in 1955, was not dividends taxable to Thomsons.
6. That Thomsons sustained a loss in 1955 on their Aero Sales Co. stock with no tax credit.
7. That computations under Rule 50 are wrong.

Respectfully submitted,

WALDEMAR THOMSON

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined rules 18, 19 and 39 of the United States Court of Appeal for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Waldemar Thomson

WALDEMAR THOMSON
in Propria Persona

Dated at Los Angeles
California
September _____, 1967.

PROOF OF SERVICE

I, Waldemar Thomson, hereby declare under penalty of perjury, that on ____________________ I served three copies of the brief herein upon respondent by depositing same in the United States mails in a sealed envelope, the postage fully prepaid, addressed to The Honorable Mitchell Rogovin, Assistant Attorney General of the United States, c/o U.S. Department of Justice, Washington, D.C. 20530.

/s/ Waldemar Thomson

WALDEMAR THOMSON

Dated at Los Angeles,
California
September ____, 1967.

APPENDIX A

REFERENCES OF EXHIBITS TO TRANSCRIPT

Exhibit No.	Description of Exhibit	R.T. 12-7-1964 12-8-1964 Page
1.	Petitions 1337-63, 1338-63, 1339-63, 1340-63	5 to 16
2.	Complaint Aero v. Columbia, CA 29419 D.C.S.F.	5 to 16
3.	Amendment to Complaint CA 29419	5 to 16
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8a.	Aero Income Tax Return 1954	5 to 16
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10c.	Walter Thomson Income Tax Return 1953	5 to 16
11d.	Walter Thomson Income Tax Return 1954	5 to 16
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13f.	Ione Thomson Income Tax Return 1953	5 to 16
14g.	Ione Thomson Income Tax Return 1954	5 to 16
15h.	Ione Thomson Income Tax Return 1956	5 to 16
16i.	Walter and Ione Thomson Income Tax Tax Return 1955	5 to 16

Nos. 22,109 and 22,109-A

IN THE UNITED STATES COURT OF APPEALS

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Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

WALTER THOMSON and IONE THOMSON,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

CITATIONS

Cases:

IN THE UNITED STATES COURT OF APPEALS

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 119-137) are not officially reported.

JURISDICTION

This petition for review (I-R. 203-205) involves federal income taxes for the taxable years 1954 and 1955. On December 31, 1962, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency, asserting deficiencies in the aggregate amount of $21,921.99. (I-R. 6, 17.) Within 90 days thereafter, on March 28, 1963, taxpayers filed petitions with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-3, 13-15.) The decisions of the Tax Court were entered February 1, 1967. (I-R. 197, 202.) The case is brought to this Court by a petition for review filed April 21, 1967 (I-R. 203-205), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly determined that five-sixths of the amount taxpayers received in settlement of an antitrust suit is taxable as ordinary income under the provisions of Section 61(a) of the Internal Revenue Code of 1954.

2. Whether the entire amount received in a compromise settlement of a civil action against the United States is taxable as ordinary income under the same provisions.[1/]

1/ Taxpayers attempt to raise two other issues which were not considered below and thus are not properly presented on appeal. The taxation as dividends of certain receipts (Appendix to Petitioner's Brief, p. B-13) was not presented below at any time. The question of the treatment of a capital loss (id., p. B-6) was first raised in the Tax Court in Rule 50 proceedings, and the Tax Court correctly ruled that the new claim could not be raised at that time. Bankers Coal Co. v. Burnet, 287 U.S. 308 (1932); Fifth Street Bldg. v. Commissioner, 77 F. 2d 605 (C.A. 9th, 1935).

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * *

(26 U.S.C. 1964 ed., Sec. 61.)

STATEMENT

Taxpayers Walter Thomson and Ione Thomson (hereinafter sometimes referred to as the individual taxpayers) are husband and wife residing in Los Angeles, California. They each filed individual federal income tax returns on the cash basis for the calendar year 1954, and they filed a joint federal income tax return on the cash basis for the calendar year 1955. (I-R. 120;)

Aero Sales Company (hereinafter referred to as ASCo.), now dissolved but represented by individual trustees (the individual taxpayers, and Cynthia Farver), was a Texas corporation which filed its federal income tax returns on the cash basis for the calendar years 1954 and 1955. ASCo. was organized in 1947 to handle scrap metal. (I-R. 121.)

Shortly after World War II, upon being assured by several steel companies of an available supply of steel, Walter constructed a plant outside Houston, Texas, which was known as Texas Tank Company (hereinafter referred to TTCo.). TTCo. was a proprietorship organized to manufacture propane and butane tanking equipment. (I-R. 121.)

On January 18, 1950, ASCo. and the individual taxpayers doing business as TTCo., began a civil action in the United States District Court against a dozen or more steel companies. The complaint was filed under the Clayton Act, i.e., Act of October 15, 1914, c. 323, 38 Stat. 730, Sec. 4 (15 U.S.C. 1964 ed., Sec. 15); and requested triple damages for violation by defendants of the Act of July 2, 1890, c. 647, 26 Stat. 209, Sec. 1 (15 U.S.C. 1964 ed., Sec. 1), commonly known as the Sherman Anti-Trust Act. (I-R. 122-123.)

The complaint alleged that the defendants and coconspirators engaged in an unlawful combination and conspiracy to restrain interstate trade and commerce in steel products by refusing to sell such products to customers other than "old," "regular," or "historical" customers. The complaint, as amended, claimed damages as follows (I-R. 123):

	Expected Profits	Loss of Value of Assets	Simple Damages	Damages Trebled
ASCo.	$ 665,700	$101,500	$ 767,200	$2,301,600
Walter & Ione, d/b/a TTCo.	1,881,800	130,000	2,011,800	6,035,400
Total	$2,547,500	$231,500	$2,779,000	$8,337,000

The plaintiffs therein presented their evidence to a jury. At the trial plaintiff Thomson was not allowed to testify as to the amounts of estimated profits which TTCo. would have earned but for the acts of the defendants. The trial court judge sustained defendants' objections to such estimate on the grounds that no sufficient foundation was laid. However, plaintiffs were allowed to introduce into evidence a report, prepared by one of the defendant steel companies, which gave an estimate of TTCo.'s potential profits. That report would support a verdict of $500,000 for loss of profits. The trial judge, however, was skeptical of the value of said report for determining damages. (I-R. 123-124.)

All the defendants moved to dismiss at the close of their evidence, and these motions were argued orally. Before the court ruled on the motions to dismiss, the parties entered into a compromise settlement wherein the plaintiffs received a net payment of $47,686.55. The anti-trust case was closed in March 1955. The parties executed a general release and a dismissal with prejudice was filed. The release recited formal matters only and stated consideration of $10. (I-R. 124.)

On August 10, 1949, ASCo. commenced a civil action against the United States in the Court of Claims of the United States. The petition set forth six separate causes of action and claimed damages in the amount of $14,956. The first cause of action claimed damages for unpaid commissions in the amount of $2,775. The remaining five causes of action alleged that certain shipments of metal were received from the War Assets Administration, an agency of the United States, and that the metal was either defective or did not meet specifications of the sales document forwarded by that Administration. In regard to said shipments of metal, ASCo. claimed damages for the following: (1) unpaid commissions and damages for imperfect merchandise; (2) various items of cost incurred in connection with several shipments relating to freight charges, storage, handling and loading, and use of heavy equipment; and (3) in one instance, the sales price of $3,004.87 paid on a shipment which was returned to the War Assets Administration. (I-R. 122.)

Prior to trial of the foregoing suit, the United States had filed a civil action against ASCo. in the United States District Court, Houston, Texas, to collect an unpaid invoice due and owing the War Assets Administration for approximately $7,000. (I-R. 122.)

Before going to trial, the parties in 1954 entered into a compromise settlement wherein ASCo. received $1,182 and cancellation of the abovesaid unpaid invoice. (I-R. 122.)

The individual taxpayers did not include the payment of $47,686 received in settlement of the antitrust suit in their taxable income for 1955 because they thought that it was a nontaxable recovery of capital. ASCo. did not include in income the $1,182 received in 1954 in compromise settlement of the Court of Claims case because it believed it was a nontaxable capital recovery. (I-R. 126.)

For the year 1955 the Commissioner included $36,356 in the individual taxpayers' income, and $11,330 in ASCo.'s income on the ground that the $47,686 received in settlement of the antitrust suit represented recovery of lost profits. The Commissioner included $1,182 in ASCo.'s 1954 taxable income on the ground that it also represented lost profits. (I-R. 126-127.)

Taxpayers filed petitions in the Tax Court for the redetermination of the deficiencies produced by the inclusion of the above amounts in their taxable income. (I-R. 1-3, 13-15.) The Tax Court held that five-sixths of the payment in settlement of the antitrust suit was for loss of profits, and that one-sixth was for injury to the business. (I-R. 129-132.)

It held that the entire payment in settlement of the Court of Claims suit was for loss of profits. (I-R. 127-129.) This appeal followed. (I-R. 203-205.)[2]

SUMMARY OF ARGUMENT

The Tax Court correctly held that five-sixths of the amount taxpayers received in settlement of the antitrust suit was taxable as ordinary income. Whether a settlement payment is taxable as ordinary income or as a return of capital depends on the nature of the underlying action. After considering the complaint and the evidence presented in the settled action, the Tax Court correctly decided that two-thirds of the payment was received in lieu of punitive damages and that the remaining one-third represented ordinary income and capital return in equal proportions.

The Tax Court also correctly held that the entire payment received in settlement of the action against the United States was taxable as ordinary income, since the taxpayer failed to sustain his burden of proving that another designation of the payment was proper.

2/ Two separate issues, concerning depreciation and business expenses, were considered below but are not presented on appeal.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT FIVE-SIXTHS OF THE AMOUNT TAXPAYERS RECEIVED IN SETTLEMENT OF THE ANTI-TRUST SUIT WAS TAXABLE AS ORDINARY INCOME

Whether an amount received in settlement of legal action represents ordinary income under Section 61(a) of the Internal Revenue Code of 1954, supr or a return of capital depends on the nature of the underlying action. Carter's Estate v. Commissioner, 298 F. 2d 192 (C.A. 8th, 1962); Raytheon Production Corp. v. Commissioner, 144 F. 2d 110 (C.A. 1st, 1944). That is, if an action seeks damages for loss of profits, any payment made in settlement of the case is taxable as ordinary income. Likewise, if an action is brought for damages for injury to a business or to capital, a settlement payment is treated as a return of capital.

In order to determine, for tax purposes, the nature of the settlement payment received, the courts look at the complaint in the underlying action, the settlement agreement, the written release, and any other evidence indicating whether the settlement payment was received in lieu of ordinary income or return of capital. Freeman v. Commissioner, 33 T.C. 323 (1954); Carter's Estate, supra. This Court has stated that in determining whether a receipt represents ordinary income or return of capital "it is the nature underlying claim that controls." Spangler v. Commissioner, 323 F. 2d 913, 916 (C.A. 9th, 1963). Obviously, the best evidence of the underlying claim is the complaint in the settled action.

In determining the nature of the settlement payment made in the antitrust suit in the present case, the Tax Court considered both the complaint in the case and the evidence presented to the jury. Neither the settlement agreement nor the release indicated a specific breakdown of the lump-sum payment. Therefore, the court acted on the "reasonable assumption" that the settlement was intended to satisfy all the various claims made in the suit. Telefilm, Inc. v. Commissioner, 21 T.C. 688 (1954), reversed on other grounds (C.A. 9th), decided May 2, 1955 (55-1 U.S.T.C., par. 9453).

The complaint requested punitive damages. Therefore, the Tax Court was correct in allocating two-thirds of the settlement payment to punitive damages, since they are awarded automatically if compensatory damages are found. Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (C.A. 8th, 1945). Thus, two-thirds of the payment, received in lieu of punitive damages, must be taxed, as would be punitive damages, as ordinary income. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

Taxpayer objects to the "retroactive" application of the Glenshaw decision to the facts of his case. This, however, is not a retroactive change in the law, but a change in the interpretation of existing law.[3/] Taxable income is a changing concept, and, as it was possible to redefine income so as to tax the punitive damages received by the taxpayers in Glenshaw, supra, it is also proper to apply this decision to the taxpayers in the present case. The design of the Internal Revenue Code is to reach all gain that is constitutionally taxable,

3/ Retroactive income taxation is, however, a constitutional power of Congress. 1 Mertens, Law of Federal Income Taxation (Rev.), Section 4.14. Furthermore, the Commissioner is permitted to change prior rulings, determined to be based on a mistake of law, by new rulings having a retroactive effect. Automobile Club v. Commissioner, 353 U.S. 180 (1957); Wolinsky v. United States, 271 F. 2d 865 (C.A. 2d, 1959).

and there is no constitutional barrier to taxation of punitive damages. Cf. Glenshaw, supra, p. 429.

In determining the nature of the remaining one-third of the settlement payment the Tax Court had a duty to make an approximate allocation in light of the information before it. Cohan v. Commissioner, 39 F. 2d 540 (C.A. 2d, 1930). Since approximately 91% of the damages claimed by taxpayers were for lost profits (I-R. 123), but very little evidence concerning lost profits was admitted at the trial of the antitrust suit, the Tax Court determination that the compensatory damages represented ordinary income and return of capital in equal proportions was a reasonable allocation.

The determination of the nature of a claim for damages is considered a question of fact. Carter's Estate, supra; 9 Mertens, Law of Federal Income Taxation (Rev.), Section 51.24. Therefore, unless a Tax Court finding that a given payment is ordinary income is clearly erroneous or arbitrary, its decision should be accepted on appeal. Phoenix Coal Co. v. Commissioner, 231 F. 2d 420 (C.A. 2d, 1956); Carter's Estate, supra.

II

THE TAX COURT CORRECTLY HELD THAT THE ENTIRE AMOUNT RECEIVED IN COMPROMISE SETTLEMENT OF THE CIVIL ACTION AGAINST THE UNITED STATES WAS TAXABLE AS ORDINARY INCOME

In order to decide whether the amount received in settlement of the Court of Claims case should be treated as ordinary income or as a return of capital, it is again necessary to determine the nature of the the claim made in the underlying action. Raytheon, supra; Carter's Estate, supra.

The Commissioner's conclusion as to the nature of the settlement payment is, of course, presumptively correct. Sager Glove Corp. v. Commissioner, 311 F. 2d 210 (C.A. 7th, 1962); Welch v. Helvering, 290 U.S. 111 (1933). If a taxpayer believes that the Commissioner's allocation to ordinary income is incorrect, he has the burden of showing that a different allocation is proper. Durkee v. Commissioner, 162 F. 2d 184 (C.A. 6th, 1947); Aluminum & Metal Service, Inc. v. Commissioner, 358 F. 2d 138 (C.A. 7th, 1966). "In order to carry * * * [his] burden of proof, petitioner must do more than merely claim alternative designations for what * * * [he] recovered--* * * [he] must prove a designation so that some orderly tax treatment may be accorded it." Sager Glove, supra, p. 211.

In the Court of Claims action taxpayer ASCo. sought damages of $14,956, of which $2,775 was clearly for lost profits. (I-R. 122.) After considering the other claims in the complaint and hearing testimony on December 7, 1964, as to alternative designations for the damages sought (Doc. No. 18), the Tax Court concluded that the entire amount sought was in lieu of lost profits. The only contrary evidence was the testimony of taxpayer Walter Thomson, and this testimony was not sufficient to carry his burden. (I-R. 128-129.)

CONCLUSION

For the reasons stated above, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

December, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ______________________________ day of ______________, 1967

____
Attorney

CASE #206-61 UNDER RULE 47-C

IN THE UNITED STATES COURT OF CLAIMS

W. Thomson, petitioner v. The United States, respondent

PETITION FOR REVIEW BY THE ENTIRE COURT

WITH

BILL OF EXCEPTIONS TO COMMISSIONERS REPORT

AND

BRIEF

Edwin L. Weisl Jr. - Assist. U.S. Attorney General
Herbert Pittle, Atty. - U.S. Dept. of Justice
for respondent

W. Thomson, petitioner in Pro Se
Jerrell Babb, as counsel
for petitioner

Prepared by
W. Thomson
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Los Angeles, Calif.
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IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Respondent) Case #206-61

EXCEPTIONS TO REPORT OF COMMISSIONER

1. The report of the Commissioner is wrong on its face.

2. Said report is a misapprehension of the facts, and a misapplication of the law.

3. The report of the Commissioner does not conform to the mandate of the court filed March 18, 1966.

4. The hearing on March 8, 1967 did not conform to said mandate of the Court.

5. At said hearing Commissioner, over objection and motion to strike, admitted irrevelent, immaterial, and heresay testimony and extraneous matter by Robert A. Rowe, and refused to strike same in post trial proceedings. For details please refer to appendix F.

6. Commissioner cites no law to support his opinion and has none.

7. The inclusion of report of Case 206-61 under Rule 47(C) into the Report of Commissioner in Case 174-65 is contrary to previous rulings of the Court and prejudicial to petitioner.

8. There is no evidence in his report that Commissioner ever read or considered petitioners proposed findings of fact deated April 7, 1967, both of which are incorporated herein and

made a part hereof as if quoted verbatum.

9. Motion to strike direct examination of Robert A. Rowe was denied in error.

10. Motion to strike portions of defendants brief was denied in error.

Very respectfully submitted

W. Thompson, petitioner

Dated at Los Angeles,
California this______
day of January 1968

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Respondent) CASE #206-61

BRIEF

PREAMBLE

The confusion and error, in the case herein, stems from the failure of Commissioners Stone and Bernhardt to recognize the fact that the government in its land acquisitions, employs three distinct classes of specialists in land appraisal work.

"Captive" class one and "independent" class two are employed exclusively by the "acquiring agency", herein the Navy, with the prime object and purpose of making appraisals and appraisal reports for the use of "negotiators" maintained in parallel, to acquire desired properties by "negotiation".

Class three is employed exclusively by the Department of Justice for the prime object and purpose of attending court as "expert witnesses" in the trials, in proceedings in eminient domain, to acquire such parcels as the "acquiring agency" is unable to acquire by "negotiations". For details please refer to Appendix A.

AUTHORITY

Authority for this petition and brief is found in Rule 58 of the Court.

STATEMENT OF QUESTIONS RAISED

1. Was petitioners employment terminated on August 8, 1959? Report P2 L17: Appendix B.

2. Would petitioner have completed his employment had he finished his appraisal and filed his report on August 22, 1959? Report P2 L18 and 19: Appendix A paragraphs 6, 7, 8, and 9.

3. Can August 22, 1959 be construed as a constructive completion date of petitioners employment by respondent? Report P2 L30: Appendix A, paragraphs 6, 7, 8, and 9.

4. Were items 1, 2, and 3 above within the scope of Commissioners inquiry under the Courts decision of March 18, 1966? RT 3/8/67 P5: Appendix C.

5. Is Report Pg 2 paragraph 3 a misapplication of law? Appendix D.

6. Is Report Pg 2 paragraph 3 a misapprehension of the facts? Appendix E.

7. Did petitioners employment begin on June 2, 1959? RTp 3/8/67-P9 L21-26 to L1-P10. It began on June 1, 1959.

STATEMENT OF THE CASE

The only issue herein is: By what sum, if any, has defendant proved, the judgment of the Court filed March 18, 1966 ($7,125.00) should be offset by expenses saved by petitioner or sums petitioner did or could reasonably have earned during the period August 9 to September 5, 1959. For details please refer to Appendix G.

ARGUMENT

1. Petitioners employment by respondent was not terminated on August 8, 1959. Appendix B.

2. August 22, 1959 was not a "constructive completion date" of petitioners employment. Appendix C; Appendix A paragraphs 6, 7, 8, and 9.

3. Report page 2, paragraph 3 is a misapplication of the law. Appendix D.

4. Report is a misapprehension of the facts. Appendix E; Appendix A, paragraphs 6, 7, 8, and 9. Report page 2, paragraph 3 seeks, under Rule 47C, to alter a final judgment on grounds not provided in Rule 68 governing.

5. June 2, 1959 report P3L2 should b June 1, 1959. Report P2 paragraph 2 (L28-33).

7. Commissioner proved the "sole appropriate reduction" to be the amount of $120.00 Report P3L3to6. Defendant having failed to discharge its burden of proof as required by the mandate of the Court dated March 18, 1966. But, Commissioner having proved an appropriate reduction of $120.00 plaintiff is entitled to $7,125.00 less $120.00 or $7,005.00.

PRAYER

Wherefor petitioner prays the Court for the sum of $7.005.00 plus interest thereon, if allowable by law, or in lieu thereof a hearing before the entire Court on the merits and separate and distinct from hearing on any other matter petitioner may have before the Court.

Dated at Los Angeles,
California This ______
day of January 1968

W. Thompson, petitioner

APPENDIX A

1. The confusion and error in the cause herein arises from the failure of Commissioners Stone and Bernhardt to recognize that the government in its land acquisitions employs three distinct classes of specialists in land appraisal work.

RT 3-11-63: P23L12; P75L20-23; P89L7; P90L2.

2. The acquiring agency, the Navy, as herein, the Corps of Engineers, as described by Mr. Robert A. Rowe, employs two classes of appraisers. The first class is "Captive" made up of salaried employees designated as "Staff Appraisers such as Robert A. Rowe in 1959 R.T. 3-8-67 p38 L1 and 2. Said 'Captive' appraisers are under the supervision and review of District Appraisers", as is Robert A. Rowe in 1967 R.T. 3-8-67 p37 L17 and said District Appraisers are under the supervision and review of "Regional Appraisers' as was Mr. Harper in 1959 R.T. 3-1163 P55 L21 and 22, and still is.

3. The second class is made up of "Independent Appraisers employed by the acquiring agency as was Arnold Prackel and Roy Hanson employed by Mr. Harper in 1959. Defs 19.

4. The primary object and purpose of class one and class two appraisers is to make appraisals and appraisal reports for the use of negotiators", maintained in parallel, who are employed to acquire desired properties by negotiations .

5. "Negotiations" are initiated on the reports of the first class of appraisers. When these "negotiations" bog down a second set of "negotiations" is undertaken on the reports of the second class of appraisers. When the second set of 'negotiations' bog down the parcels remaining to be acquired are referred to the Department of Justice for proceedings in the Courts in eminent domain and the duty falls on the United States District Attorney. By that time appraisals and appraisal reports have been made "a nauseum" and said U.S. Attorney is in need of none. R.T. 3-11-63 P93 L17.

> "It was explained also to Mr. Thompson at this same conversation, that the Navy had already appraised all of these parcels of land by their own staff of appraisers and appraisers hired by the Navy Department and that many of the parcels were being acquired by the Navy on its own appraisals."

6. What said U.S. Attorney needs is an "expert witness" and where, as here, some ten million dollars at stake, said U.S. Attorney seeks out the very best and most highly qualified expert witness available to him offering the highest pay within his capabilities. R.T. 3-11-63 P25, 26, P27 L1 to 6; P29, 30, 31, P32, P33, P34, P35, P36, L17-22, P43 L3 to 4; R.T. 3-8-67 P5 L25, P6 L1 to 4. Defs 4 paragraph 2 P1 L6 to L12; Defs 25 P3 paragraph 2 and 3.

7. Said expert witness, on accepting employment as such, seeks to establish values that he feels able to sustain in Court and thereafter to employ whatever time is available to him to so clarify and refine his testimony as to attain the highest possible

degree of credibility. R.T. 3-11-65 P84 L2; R.T. P85 last line. Defs 1 P2 paragraph 2; Defs 19 P2 paragraph 2; Defs 2_ P1 paragraph 2; L4 and 5.

8. The report of an expert witness is incidental to but is not the prime object and purpose of his employment. R.T. 3-8-67 P17 L13-24; R.T. P18 L24-26.

9. The duty of an expert witness does not cease upon the completion of his report but only upon the completion of the prime object and purpose of his employment. To wit: His attendance in Court as an expert witness. R.T. 3-8-67 P31 L15-18; L23-26; P32 L8-9; P33 L6 to 14;

Defs - 4 P1 paragraph 2; Defs 5, Defs 6, Defs 14, Defs 25 P3 paragraph 3.

10. From the above it is clear that goings on in the U.S. Corps of Engineers bears no relationship to an expert witness employed by the U.S. Department of Justice. R.T. 3-8-67 P66 L24-25

A. Mr. Rowe: "I wouldn't even know what the Department of Justice is doing first hand." R.T. 3-8-67 P67
A. Mr. Rowe: "My answer is no for me testifying to anuthing the Department of Justice does."

APPENDIX B

1. That petitioners employment by respondent was terminated on August 8, 1959 (Report P2 L16-17) Defs 21

> "We wish to impress upon you that you should render no further services in connection with No. 1836ND and 1904ND until you have received written authorization." R.T. 3-8-67 P32 L4, P32 L25, :33 L6.

No inference can be drawn from the words above that respondent, at that time, intended to terminate petitioners employment and the only inference that can be drawn from the letter, as a whole, in that petitioner should refrain from further work until proval of petitioners employment was had from Washington.

Respondent had gone to great pains to seek petitioner out and had made no complaint or indicated in any manner that petitioner was anything but the "highly desireable" expert witness petitioner knew himself to be. R.T. 3-8-67 P32 L8-9; L15-16; P33 L6-14.

APPENDIX C

RT 3-8-67 P5 L7-12 Mr. Thomson: "Plaintiff believes that the burden of proof of any offsets to the total amount of $7,125.00 as found by the Court lies upon the defendant."

RT 3-8-67 P5 Mr. Pittle: "Then I will proceed with defendants position in the matter of offsets."

Appendix "A" paragraphs 5,6,7,8, and 9.

Petitioner believes that the intent of the Court in its mandate filed March 13, 1966 was not a trial de novo but to limit the inquiry under Rule 47C to such appropriate deductions as incidental expenses, travel espenses, and miscellaneous expenses which plaintiff earned or could have earned from others during the period August 9, 1959 to September 5, 1959.

There is no foundation in the record that on August 8, 1959 responder intended to "terminate" nor that petitioner considered himself terminated. Appendix B.

There is no foundation in the record that August 22, 1959 was a constructive completion date. RT 3-8-67 P17 L11 to 26; P18 L5 to 26; P19 L4 th 18; P20 L10 to 26; P30 L3 to 23 Appendix A paragraphs 6,7,8, and 9.

Defs 5, Defs 6, Defs 14 all authorize and approve petitioners employment as an "expert witness", the authorization and approval in Defs 14, here at issue being the sum of $7,125.00.

Preamble paragraphs 6,7,8, and 9.

Commissioner fell into error by his assumption that the prime

APPENDIX C

object and purpose of petitioners employment was to make an appraisal and prepare a report.

Since the prime object and purpose of petitioners employment was to attend Court as an expert witness for respondent in trials to begin early in September 1959 Commissioners report is wrong on its face.

APPENDIX D

Report P2 paragraph 3 is a misapplication of the law.

"If some substantive portion of a government drawn contract is fairly susceptible of a certain construction and contractor actually and reasonably so construed it that is the interpretation which will be adopted unless parties intention in otherwise affirmatively." Blount Bros. Const. Co. v. U.S. Ct. Cl. 1953-346 F2d 962.

"So though a contract of employment contains no other express promise of the employer to employ than to pay a stipulated compensation there is an implied promise to employ which is violated by refusal to allow the employee to perform his duties as such." Williston on Contracts Sec 1293 P3684 Vol 5. Flour Mills of America v. U.S. Ct. Cl. 7-747-72FS 603

"The rule is that a contract is to be construed most strongly against the party who prepares it (in this case the respondent letter of February 3, 1959) and it applies to the United States." 'Garrison v. U.S. 7 Wall 688; U.S. v. Newport News 178 F 194; Blount Bros. Const. v. U.S. Supra."

APPENDIX F

Report P2 paragraph 3 is a misapprehension of the facts.

> "where an appraiser contracts with the government to perform specified appraisal services for an estimated period of time."

Petitioner in the matter here at issue did not contract with the government to perform as Commissioner states. Read four square with Mr. Weisers cover letter of February 3, 1959 and petitioners cover letter to Weiser dated May 2, 1959 and in conjunction with. Defs 14, Request and authorization to incur expense, it is clear that respondent employed petitioner to testify in court as an expert witness for respondent. Any appraisal or appraisal report would be incidental.

Defs 14 - Authority is hereby requested to incur the expenses described here below:

> "Services as an expert witness of Waldemar Thomson in connection with appraisals of parcels in 1836ND and in appraisal of easement and restrictions in 1904ND. You are authorized to incur the above mentioned expense. Date July 10, 1959."

Defs 13 - P1 paragraph 3:

> "Judge Pierson Hall, U.S. District Judge, to whom these matters are presently assigned has been pressing this office for trial dates within the near future."

APPENDIX F

Over petitioners vigorous objections and motions to strike respondent was allowed to introduce a lot of irrevelent, immaterial, irresponsible hearsay testimony and lengthy discertations by Robert A. Rowe, who in 1959 was a "staff appraiser for the U.S. Corps of Engineers. Post trial motion to strike was denied. RT 3-8-67 P37 to 56.

The vice of such testimony is that no matter how hard the Commissioner might strive, the human mind is such that the Commissioner could not expunge it from his mind.

On cross examination Mr. Rowe admitted that the Corps of Engineers did not offer to employ petitioner during the period August - September 1959. RT P56 L13 to L25 - 3-8-67.

On further cross examination Mr. Rowe testified: RT P58 L1 3-8-67:

> "I think there is possibly a little misconception here. We do not hire anyone to be paid on Justice Department funds."

In other words the Corps of Engineers hires only "appraisers to make appraisals" and does not hire any "expert witnesses".

RT P66 L24 A Mr. Rowe:

> "I wouldn't even know what the Justice Department is doing first hand."

Q. Mr. Babb: L26
"You don't know do you?"

A. RT P67 . Mr. Rowe:
"My answer is no for me testifying to anything the Justice Department does."

A. RT P67 L12 A. Mr. Rowe:
"I wouldn't know anything that I could state for myself on the Justice department rates."

IN THE UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

alter Thomson and Ione Thomson

Petitioners

v.

ommissioner of Internal Revenue

Respondent

---

rustees of Aero Sales Co - Dissolved

Petitioners

v.

ommissioner of Internal Revenue

Respondent

N PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF

THE UNITED STATES

APPELLANTS REPLY BRIEF

Walter Thomson
En Pro Se
FOR PETITIONERS
305 S. Normandie Ave.
Los Angeles, Ca. 90005

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

22109 - 22109A

lter Thomson, et ux

Petitioner

v.

mmissioners of Internal Revenue

Respondent

PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT

THE UNITED STATES

TCM 1965 - 237 - AS TO TC 1337-63:1340-63

PELLANTS REPLY BRIEF

---

mmary of Appellants Reply to Respondents Brief:

FOOTNOTE 1: RESP BRIEF, PG 2, IS UNTRUE.

FOOTNOTE 3: RESP. BRF, PG 9, LNS 1 AND 2: Commr is not Congress. Single event occurrences, as herein, are exceptions.

FOOTNOTE 3: RESP BRF PG 9, LNS 3 - 6: The Courts have uniformly over-ruled upset of long established admin practice.

RESP BRF PG 9, PARA 3: A Supreme Court decision upsetting long established case law is a change in the law.

ALL SETTLEMENTS RECITED IN RESP. Argument II, PGS 3-10 resulted in "accessions to wealth clearly realized". Only one case, Telefilm was tried to jury as was Aero v. Columbia.

SETTLEMENT HEREIN fell $125,313.45 short of $173,000. loss "clearly realized" from same acts resulting in $47,636.55 settlement.

RESP BRF, PG 6, PARA 1: is taken from "evidence" excluded at the trial "leaving Commrs case standing on one leg".

COMMR AUTOMATICALLY, without more, taxed $1,132. to Aero Sales Co solely because receipt resulted from a "settlement" Attempted 11th hour "cure" stands on one leg and is reflected by testimony of taxpayer.

STATEMENT OF APPELLANTS REPLY

FOOTNOTE 1: RESP. BRF., PG 2: IS UNTRUE. Appellant objected to taxation of "legal fiction" dividends in TC 1340-63, pg 1, para. 5, item "C" and again in TC 1340-63, Pg 4, Para. 6, item 4. Appellants opening brf. Appen "B", Pg 13

Stout v. Commr 273 F2d 345 (4th Cir. 12/29/59)

Penn v. Robertson 115 F2d 167, 174

pellant advanced 1955 loss on Aero Sales Co. stock; in TC 1340-63, 2, para 6, item 2. Matter was excusable overlooked at trial in nfusion resulting from "hurry-up" orders of trial court; again vanced in Doc. 25; again in Doc 26, and finally by motion, oral d written, on Sept 14, 1966. Appellants Brf. Appen "B", PG 12. id loss is properly before the Ninth Circuit Court inequity.

Slater v. Commr 356 F2d 66_, 670

Knight Newpapers v. Commr 143 F2d 1007

Collins v. Commr 32 F2d 753, 754

FOOTNOTE 3: LNS 1 and 2, RESP BRF., PG 9: The "single event occurrence" was completed in Mar 1955 in reliance upon law long well established by uniform decision of the Courts appellants opening Brf., appen. "E", pgs 1-5.

Obear Nester Glass Co. v. Commr 20 TC 1102, 1109

"To tax a single event occurence (over which tax payer had no control) after it happened is shocking".

1 Mertens Law Fed. Tax Oct 1967, Supp Sec. 4.14, footnote 33.3

Prather v. Commr 322 F2d 931 (CCA 9th, 1963, pg 935, footnote 2.)

Cohan v. Commr 39 F2d 540, 545 (10)(11), Col. 1, para 2, lns 1-13; Col. 2, para 1, lns 19-23

appellants receipt of $47,636.55 in Mar 1955 was a "single event occurrence". Under law, then well established by uniform Court

decision over two decades, 2/3 of said $47,6__.55 or $31,791.03 was non-taxable in lieu of punitive damages.

FOOTNOTE 3: LNS 3 TO 6, RESP BRF., PG 9. The courts have uniformly over-ruled retrospective taxation by upset of long established admin. practice.

CIR v. Monarch Life 114 F2d 314 (CCA 1940)

Helvering v. RJ Reynolds 306 US 110

Kress v. US 159 FS 333

RESP BRIEF, PG 9, PARA 3: A Supreme Court decision, upsetting long established case law is a change in the law. Appellants opening brief, Appendix "B", Pg 3.

109 U of Pa. Law Rev 74; Judge Story in Prop of Gospel v. Wheeler 2 Gall. 105, 139; Gray - Limitation of Taxation 1906 Sec. 102 ; Bowie v. Columbia 373; Bass Ratcliffe & Gretton v. State Tax 266 US 271, 280, 284

ALL SETTLEMENTS RECITED IN RESP. ARGUMENT II, PG 9-10, RESULTED IN "ACCESSIONS TO WEALTH, CLEARLY REALIZED", either as recovery of profits or recovery of capitial gains in "excess of the basis" Only one case was tried to jury prior to settlement. Telefilm Inc v. Comm 21 TC 688 (1954). In telefilm, the Tax Court lead "jury award to be most reasonable basis".

SETTLEMENT HEREIN FELL $125, 13.45 SHORT OF $171,500. LOSS.

"CLEARLY REALIZED" FROM SAME ACTS RESULTING IN $47,636.55

RECEIPT. Appellants opening brf, append "B", pgs 6 to 11.

Michelsen v. Neb Tire 63 F2d 597, 601 (8th Cir)

H. Liebes & Co v. Commr 90 F2d 932, 935 (9th Cir 6/14/37)

"RECOVERY FOR INJURY TO CAPITAL IS NEVER INCOME"

Said recovery was after trial to jury wherein NO testimony as to loss of profits WAS ALLOWED. Appellants opn brf pgs 6 to 8.

Telefilm Inc v. Commr 21 TC 6.., 694 (1954) and 1/3 of $47,6..55 or $15,895.52 was clearly return of capital.

RESPS BRF, PG 6, PARA 1: is taken from "EVIDENCE EXCLUDED AT TRIAL" leaving respondents argument II, standing on one leg. Appellants opn brf, append "D", pg 6, RT pg 106, ln 4.

COMMR AUTOMATICALLY, WITHOUT MORE, TAXED $1,1.2. TO AERO SALES IN 1954, SOLELY because receipt resulted from a settlement.

Stout v. Commr 273 F2d 345, 350 (4th Cir. 12/29/59)

Manchester Paper Box Co v. Commr .9 F2d 315

tempted 11th hour "cure" stands on one leg, is incompetent and pure speculation 16 years after the event. Appell. opn brf. appen "D", pg 5, ln 15 to pg 6, lns 8 and 9, lns 13. RT pg 106, ln 4.

and is reflected by taxpayer who handled the transaction. Appel opn brf. append "D" pg 6 & 7. RT pg 99, ln 20 to ln ., pg 100, RT pg 101, ln 4 to ln 7.

HSD Co v. Kavanagh 191 F2d 831, (3), 939

PROOF OF SERVICE

LLIAM HERMANSEN, declare under penalty of perjury that e served respondent herein, by enclosing three copies f (centerfolded) in a sealed envelope addressed to the able Mitchel Rogorin, Asst. U.S. Attorney General, Tax, Department of Justice, Washington, D.C., and deposited into the United States Mails, postage fully paid, on ARY 14, 196_.

WILLIAM HERMANSEN

CASE #174-65

W. Thomson, petitioner

v.

The United States, respondent

EXCEPTIONS TO REPORT OF COMMISSIONER

BRIEF

Honorable Edwin L. Weisl, Jr.
Asst. U.S. Attorney General
Mr. Herbert Pittle, Attorney
for respondent

W. Thomson - Petitioner
in Pro Se

Prepared by
W. Thomson
605 S. Normandie Ave.
Los Angeles, Ca.
90005

CASE #176-65

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson
Petitioner
v.
The United States
Respondent

Case #174-65
Motion for permission to file supplemental Exceptions and Brief

Petitioner respectfully moves the Court for permission to file supplementals to petitioners Exceptions and Brief and advances to the Court the following reasons:

1. Petitioner has available to him only a part-time stenographer capable of preparing said papers.

2. Said part-time stenographer has been and still is fully occupied with year end papers for his regular employer.

3. Petitioner has been on trial in Court as an expert witness almost continuously since October 1, 1967 (and still is) and has been able to devote only his after hours to the preparation of said brief and exceptions.

4. Report of Commissioner is so replete with misapprehension of fact and law and misapplication of law that the preparation of appropriate exceptions and brief has been and is a monumental task.

5. The Court has ruled that petitioners exceptions and brief must be filled by January 23, 1968 and the exceptions and brief herein are the best that petitioner can present by said date.

6. In the hope that petitioner be allowed to file supplemental exceptions and brief, petitioner is forwarding to the Court six copies of his preliminary exceptions and brief (two for Honorable Edwin L. Weisl) retaining 25 copies of each which will be incorporated into and made a part of petitioners complete brief and exceptions if supplemental filing is allowed.

Very respectfully submitted

Dated at Los Angeles,
California this _____
day of January 1968

W. Thompson - petitioner

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Defendant)

Case #174-65
Exceptions to Report
of Commissioner

1. Commissioners Report is wrong on its face.

2. Said report is replete with misapprehension of the facts and of the law.

3. Said report is replete with misapplication of the law.

4. Said report is replete with misstatements of the facts.

5. Said report construes contracts most favorably in favor of the maker contrary to ruling case law.

6. Said report fails to apprehend or consider the wrongdoing of agents of the defendant and the innocence of plaintiff.

7. Said report is replete with consideration of irrelevant, immaterial and hearsay material.

8. Said report seeks to penalize plaintiff for the wrongdoing of agents of defendant.

9. Said report cites no authorities and ignores the authorities cited by Judge Davis on page 13.

Very respectfully submitted

Dated at Los Angeles,
California this ______
day of January 1968

W. Thompson - petitioner

IN THE UNITED STATES COURT OF CLAIMS

W. Thompson)
Petitioner)
v.)
The United States)
Respondent)

Case #174-65

Brief

PREAMBLE

Petitioner will demonstrate to the Court:

That report of Commissioner herein is misapprehension of the facts and the law and misapplication of the law so fundamental as to throw said report into doubt. Appendix A-A and B-B.

That report demonstrates such inattention to petitioners pleadings of law and fact as to violate the protection guaranteed petitioner under the 5th Amendment to the Constitution. Appendix C-C.

JURISDICTION

Jurisdiction is conferred upon the Court by Title 28 USCA Sec 1491 and Title 41 USCA Sec 5 et seq. This petition is brought under Rule 58.

INCORPORATION

Petitioner refers to his first amended complaint filed "to conform to the proof," to exceptions to Report of Commissioner and to the documents enumerated in appendix C and by reference thereto incorporates same herein and makes same a part hereof as if set forth at length. Appendix C-C.

QUESTIONS RAISED

I

Were not the rights of plaintiff, as a government contractor, iolated contrary to the protection afforded plaintiff by the ue process clause of the 5th Amendment to the Constitution.
ynch v. US 292 US571

II

Does not the Court of Claims have equitable jurisdiction o the extent of reforming contracts and of basing its decree pon contracts so reformed.
utcliff Stge. & Whse. Co. v. US 125 Ct. Cl. 297; 112 F.S570

III

May not a suit subsequent be brought upon the implied rovisions of contracts previously established as express contracts. Restatement of Judgments Sec 62b P256 para 2.

IV

Is not defendant stopped from invoking the doctrine of Res udicata.
estatement of Judgments Sec 62b P256 para 2; White v. Alder 89 NY 34 - 43N E2d 798; Res Judicata 65 Harva Law Rev 830 75 to 78)

V

In inducing plaintiff to make an unduly low bid in price erdiem did not agents of defendant make a misrepresentation of

a material fact and is not said misstatement grounds for reformation of the contract. Appendix B-B. For law see Appendix E-E.

VI

In inducing plaintiff to make an unduly low bid in days of performance did not agents of defendant conceal from plaintiff and remain silent as to material facts known to them but unknown to plaintiff and is not said concealment and silence grounds for reformation of the contract. For law see Appendix E-E.

VII

In inducing plaintiff to bid did agents of defendant intend to award plaintiff a 3rd contract to testify as to mineral values and did plaintiff so understand. (Defs. 2' P2) and did from these acts arise a 3rd contract implied in fact. Rivers v. Beadle 183 Cal app. 2d 691.

VIII

Under the law of the place of performance did the three contracts constitute one single contract with provisions express and inplied. For law see appendix E-E.

IX

Is the scope of authority and the range of duties of an independent expert witness to do all of the things he usually does as such and comparable to that of a lawyer. Kast v. Miller & Lux 115 Pac 932; Vadner v. Roselle 45 Pac 2d 561.

X

Must not the three contracts between plaintiff and defendant be construed most strongly against defendant the maker. See App. E-E.

XI

Was not the prime object and purpose of plaintiffs employment and the intention of the government that plaintiff should attend pretrial conferences and trials as defendants expert witness in Cases 1836ND and 1904ND; did not plaintiff so understand and conduct himself and did not a contract implied in fact arise from said purposes, intentions and conduct obligating both parties to see to it that said purpose and intentions were effactuated. For law see Appendix E-E.

XII

Was not there a clearly enforceable obligation upon plaintiff to attend all pretrial conferences and all trials as an expert witness for defendant in Cases 1836ND and 1904ND. For law see Appendix E-E.

XIII

Since there was said enforceable obligation upon plaintiff to attend all pretrial conferences and all trials as defendants expert witness in Cases 1836ND and 1904ND was there not an enforceable obligation on defendant to call plaintiff to said conferences and trials.

Flour Mills of America v. US Ct. Cl. 7-7-47 72 FS603

XIV

And since defendant employed plaintiff to attend all pretrial conferences and court trials as defendants expert

witness in Cases 1836ND and 1904ND was there not a promise by defendant, implied in fact, to so employ plaintiff.

Williston on Contracts Sec 1293 P3684 Vol 5.

XV

Would it not indeed be a strange doctrine that an innocent party to a contract is bound to rescind it upon any breach by the other party.

Snare and Triest v. US 43 Ct. Cl. 364, 367

XVI

Is it not impossible under the decisions cited by Judge Davis on Page 13 to construe Defs 21 to be a termination of petitioners employment by defendant.

STATEMENT OF THE CASE

On January 6, 1959 two contracts of employment of plaintiff by defendant were initiated. Said contracts were implemented by bids Defs 3 and Defs 8 approved respectively on February 19, 1959 and July 10, 1959.

Defendant devied Defs 8 and plaintiff sued. In decision, by Judge Davis, filed March 18, 1967, the Court established Defs 8 as a contract and awarded plaintiff $7,125.00, "less appropriate deductions", upon the face of said bid Defs 8 but did no more.

Plaintiff, in Case 174-65 asks reformation of said established contracts on the following grounds:

1. That the contracting officer induced plaintiff to bid $75.00 per day instead of plaintiffs usual fee of $125.00 per day by telling plaintiff that the highest per diem rate he was authorized to pay was $75.00 per day. On this statement petitioner had a right to rely and did rely in making his bid. As shown in letter dated April 29, 1958 from attorney general to U.S. Attorney said representation was in 1959 untrue. Said letter was "discovered" by plaintiff in January 1967.

2. That the contracting officer induced plaintiff to bid 155 days by withholding from plaintiff that 5 months prior he had awarded Mr. Miles a contract for 165 days to prepare himself for trial of the identical 50 parcels of property. Plaintiff in preparing his bid had a right to this information from said officer. Had said information been furnished to plaintiff, plaintiff would have bid 168 days instead of 155 days. But said information was revealed to plaintiff for the first time on March 11, 1963.

3. That contracting officer told plaintiff in Defs 2 that plaintiff would be awarded an additional contract to prepare himself for trial of Mineral parcels which Mr. Miles was not qualified to do and which work was not included in the 165 days awarded to Mr. Miles. Plaintiff had a right to rely on this statement and did. Said contracting officer never forwarded to plaintiff any bid form or said third contract although he

knew plaintiff was performing said services. Instead he awarded a contract to one Moody for 10 days at $135.00 per day to perform only a small part of the services for which he had previously employed petitioner.

4. That in Defs 3 and Defs 8 the contracting officer stated expressly that plaintiff would be expected to attend all pretrial conferences and court trials as his expert witness in Cases 1836ND and 1904ND and on this statement plaintiff had every right to rely and did. Mr. Miles was called to said pretrial conferences and trials for a total of 133 days. It is reasonable to presume that plaintiff was denied at least 85 days at $125.00 per day by the conduct of the contracting officer and defendant.

ARGUMENT

It would be difficult to find an instance of more flagrant disregard, by Federal Officers, of common decency and of the rights of a government contractor than that which is evidenced herein.

A desireable expert witness was needed for a multi-million dollar lawsuit and much trouble was gone through to seek out the right man. When he was finally located he was lied to and relevant facts were hidden from him when he was asked to prepare a bid for services. He was informed that he was to testify as to mineral values but no bid for such services form was ever sent to him, although said officers knew that

contractor was performing said services. After several months of performance by contractor said Federal Officers decided to get rid of him. No complaint was ever made of contractor's character, ability, or performance. Nor was contractor ever informed that his services were no longer desired. All that was done was to fail to notify contractor of approval of attorney general and then write contractor to stop work until said approval was had. Contractor was not dismissed nor was dismissed ever suggested. Contractor was given no occasion to believe other than he would be called to pretrial conferences and trial as defendants expert witness.

Mr. Harper and staff; Mr. Leon O'Conner and staff; Mr. Fred Prackel and Mr. Ray Hanson had made numerous appraisal reports and defendant needed no more. 50 large parcels and the minerals had been referred to the U.S. Attorney for proceedings in Eminent Domain. Said attorney needed a good expert witness to whom an appraisal report was purely incidental to his testimony in Court.

Contracts established by bids Defs 3 and Defs 8 will not bear litteral interpretation nor do contracts bids Defs 3 and Defs 8 effectuate the avowed intention of defendant to have plaintiff testify as to the values of the minerals.

Without misrepresentation and with full disclosure by officers of defendant, plaintiff would have bid 168 days to

prepare himself for trial of the 50 parcels in 1836ND and 1904ND plus 20 days for the minerals or a total of 188 days, at $125.00 per day, or a total of $22,500.00 instead of the $11,625.00 he did bid.

The presumption, based upon his policy statement in letter dated April 29, 1958, is that the attorney general would have approved plaintiffs bid for said $22,500.00.

For the attorney general, on January 31, 1958, approved $15,000.00 each to Bernard Evans and Lawrence Sando to prepare themselves for trial in the Casitas Dam Case where deposit with declaration of taking was $2,489,384 or 2/3 of the deposit of $3,561,642 with declaration of taking, in Lemoore Case. File 33-5-1919-0 January 31,1958 - 1396 and 1397.

The law of the place of performance of the contract prevails. Fairbanks Morse v. Consol. Fisheries 190 F2d 817.

Said law states that two or more contracts between the same parties upon the same subject matter, even though separately executed, constitute one contract. Lynch v. Bank of America 2 Cal app 2d 214.

Said law further states that the authority and duties of an expert witness are to do the things he usually does as such and are comparable to those of a lawyer. Kast v. Miller and Lux 115 Pac 932; Vadner v. Roselle 45 Pac 2d 561.

And the law is that a contract will be construed most strongly against the maker, defendant herein. Lynch v. US 292 US571.

Viewed four square the contract of employment between plaintiff and defendant contains provisions implied in fact, which entitle plaintiff to a reformation of said contract of employment. The court has equitable jurisdiction to reform contracts as set out in Sutcliffe Stge & Whse Co. v. US125 Ct. Cl. 297; 112 FS570.

Subsequent suit may be brought upon said implied provisions as set out in Restatement of Judgments Sec 62B P256 Part.2.

Defendant is estopped from invoking the doctrine of Resa Judicata by its own misrepresentation and concealment and by its conduct at the trial on March 11, 1963.

Restatement of Judgments Sec 62b P256 Para 2

Res Judicata Harv Law Rev 830 (75 to 78)

There was an obligation, express in Defs 3 and 8, and implied by custom and usage enforceable upon plaintiff, to be ready and to attend all pretrial conferences and all trials as an expert witness in cases 1836ND and 1904ND.

Williston on Contracts Sec 1293 P3691 Vol 5

Hostetter v. Park 137 US 30

Said enforceable obligation upon plaintiff created an equally enforceable obligation upon defendant to call plaintiff

to attend all pretrial conferences and all trials as an expert witness in Cases 1836ND and 1904ND.

Flour Mills of America v. US Ct. Cl. 7-7-47; 72 FS603.

Defendant paid Miles for 127 days at $75.00 per day on 36 parcels of fee in 1836ND and 38 days at $100.00 a day on 14 parcels of flight easements in 1904ND for preparation for trial; plus 113 days at $100.00 a day for attendance at pretrial conferences and trials. Miles perfromed at place of his office.

Plaintiff is entitled to a reformation of contracts Defs 3 and Defs 8 from 155 days to 168 days and from $75.00 per day to $125.00 per day, for preparation for trial of said 36 parcels in 1836ND and 14 parcels in 1904ND. Plaintiff is entitled to payment for 20 days at $125.00 per day on the minerals under a contract implied in fact. Miles was not qualified to testify as to the mineral values and said minerals were excluded from his contract for 165 days.

Plaintiff is entitled to 85 days at $125.00 per day for attendance at pretrial conferences and trials as an expert witness in Cases 1836ND and 1904ND, the amount of which he was deprived by defendants failure to meet its obligations to plaintiff.

Failure of the contracting agent to meet his obligation to call petitioner to attend pretrial conferences and trials in Cases 1836ND and 1904ND was the first such instance in plaintiffs

areer extending ●ver a period of almost 40 years, was an nusual occurrence, was known in plaintiffs professional circles; nd presumed in such circles to be for cause and therrfore amaging to plaintiffs reputation as an expert witness. A onsequential injury which the contracting officer could easonably forsee.

O'Dell v. Crossand Shaver 14 SE2d 767; 5 Corben Contracts ec 1095 P519.

Said contracting officer even went farther and maligned laintiff to the US Attorney General (Defs 25) and later to ommissioner of Corporations State of California. (Letter of une 4, 1962 from U.S. Attorney to Allen Hurwitz). It would e difficult to estimate the damage and mischief that the ontracting officer has done to plaintiffs reputation as an xpert witness, but to an expert witness whose daily fees are 125.00 per day the damage is surely in excess of $12,500.00.

CONCLUSION

. Plaintiff is entitled to reformation of contracts Defs 3 nd Defs 8 from $75.00 per day to $125.00 per day.

. Plaintiff is entitled to reformation of contracts Defs 3 nd Defs 8 from 155 days to 168 days.

. Plaintiff is entitled to a contract implied in fact for) days at $125.00 per day for preparation for trial as an xpert witness as to mineral values.

. Plaintiff is entitled to a contract express in Defs 3 nd Defs 8 and implied in fact for 85 days at $125.00 per day or attendance at pretrial conferences and trials in cases 336ND and 1904ND.

. Plaintiff is entitled to at least $12,500.00 as consequential damage to plaintiffs reputation as an expert witness.

. Judgment herein to be reduced by $4,500.00 paid plus amount f judgment in 206-61.

ated at Los Angeles,
alifornia this ______
ay of January 1968

Very respectfully submitted

W. Thompson

APPENDIX A-A

BASIC MISAPPREHENSIONS OF COMMISSIONER

APPENDIX A-A

NDAMENTAL MISAPPREHENSION OF FACT

mber one is found in footnote 6 of pg 9 of report.

0 days from date of approval of second contract on July 10, 1959 December 7, 1959, 98 days after September 1, 1959. An offered livery date, 98 days later than the date of need for said appisal is an absurdity.

id absurdity stems from Commissioners misapprehension and sinterpretation of the first contract. RT pg 6 lns 10 to 12.

> "In which he agreed to perform the appraisal services in C.A.-1336 ND for an estimated 60 days".

> "Language, though plain and clear will not bear litteral interpretation if this leads to an absurd result", Williston on Contracts. Sec. 610 P533, Vol. 4.

t if said, "First Contract". is a "Letter Contract". pursuant Federal Procurement Regulations, Sec. 1:3:405(b), then the econd contract" conforms to the mandate in said, F.P.R.

> "A letter contract shall be superceded by a definitive contract at the earliest possible time".

d when on February 3, 1959, Mr. Weiser inserted the 150 days said second contract, it was natural for him to assume that titioner would execute same in 30 days; that approval of the torney General would be had in another 30 days; and the date "offered delivery" would fall on September 1, 1959, the date the anticipated need for said report.

. 3-8-67 Pg 37 ln 16A: Mr. Thomson:

"You have to understand that at the time that Mr. Weiser submitted the bid to me, I understood it that it was 60 days to get me started. I had never seen the property before".

mber two is found in footnote 9 pg 13 lns 6 to 8 of report.

"There is no explanation in the second for the increase of Mr. Miles contract rate from $75 .00 to $100.00 per day".

id "increase" arose from a basic change of policy of the US

:onery General effective April 29, 1958, 8 months prior to

:titioners employment. See MEMO ANM:dc 4/29/58-RJL-CMACM

-5-1668-698 and 1D34 a document respondent failed to produce,

ordered, on 3/8/67.

ease see File 33-5-1919-0-1/31/1958, Form 25 B. Bernard Evans

396 and Laurence Sando, Form 25B-1397, both of which documents

spondent failed to produce, as ordered on 3-8-1967.

the same year, 1958, said US Attorney and US Attorney General

:ablsihed a policy of paying $25.00 to $50.00 per day additional

mpensation to cover travel and subsistence for services performed

:side of the point of residence of their expert witnesses.

:fs 4; 3-8-67 SK-NP

mber three is found in footnote 7 pg 10 and footnote 10, pg 14.

e pre-trial record between July 1966 and February 1967 clearly

monstrates the obstructionist tactics and down-right disobedience

respondent in effort to prevent any discovery and respondents

ilure on March 8, 1967 to produce more than a fraction of the

tinent documents in defendants possesion. Commr seeks to
ow respondent to profit from its non wrong doing contary to
g established rule.

ANM:dc
4/29/58

Attorney General, Lands Division,
Land Acquisition Section
Laughlin E. Waters, U. S. Attorney, So. Dist. of Calif.
Albert N. Minton, Asst. U. S. Atty. (Lands)
Civil No. 1286-ND, Tract F-1145, and Civil No. 1449-ND,
Tracts F-1103, F-1106, J-1450, K-1548 and K-1577
(Your references: RJL-CMacM 33-5-1668-698 and -1034)

Reference is made to letter, dated March 31, 1958, in connection with the above-referenced condemnation proceedings, wherein this office was requested to submit a new Form 25B and voucher for the Department's consideration, covering the services rendered in the above matters by Mr. W. A. Savage.

The oversight of the Department's requirements in not getting prior approval for this employment is regretted, and assurance is given that, so far as it is possible to prevent it, no future happening of the kind will occur.

In regard to the per diem rate asked by Mr. Savage, it should be taken into consideration that Mr. Savage is one of the most experienced appraisers and satisfactory witnesses now being employed through this office. Prior to the first of the year, Mr. McPherson, who was then in charge of the Lands Division, communicated with the Department and stated that, if it were going to be possible to retain on the list of witnesses men of the standing of Mr. Savage and certain others, it would be necessary to establish their per diem rate at the sum of $100. These men are now being paid at this rate, and above, by the State of California, the counties, and other local entities, and it is not to be expected that they will work for the government at a lesser rate when they can secure all of the employment they wish from these other agencies at the rate of $100 per day.

It is the understanding of this office that Mr. McPherson took this matter up personally with Mr. Luttrell, and received his approval of establishing the higher rate, before Mr. Savage submitted his bill and this office submitted its Form 25B. It should be noted that the per diem rate of $100 has already been approved for Mr. Savage in other cases, and for Mr. Nathan Libott and Mr. Joseph Shlichta.

33-5-1668-1034

IDAMENTAL MISAPPREHENSION AND MISAPPLICATION OF THE LAW IS FOUND FOOTNOTE 4, PG 8 OF REPORT.

:itioners original petition in Case 206-61 prayed for #7125 under : "second contract". Respondent answered denying a contract.

oof on 3-11-63 was limitied to the existance or non-existance of .d contract.

: court, on 3-18-66, established the contract and declared spondent liable and awarded petitioner judgement for the face ereof $7125 (less appropriate off-sets of amounts "saved" by :itioner or which petitioner earned or could have earned between gust 8, 1959 and September 6, 1959).

: judicita is established only as to the availability of spondent for $7125. (less $120.) Moores Federal Practice Sec.410(2)

"And in addition, qualification of the general rule against splitting may be warranted by the defendants conduct (21) and by exceptional circumstances (22)".

.) White v. Adler (1942) 289 NY 34; 43 NE 2d 798, 142 ALR 898

!) Restatement of Judgements Sec. 62(b), pg 256, para 2.

"Where the defendants fraud or mis-representation a concealment prevented the plaintiff from presenting his entire claim".

: Judicata 65 Harvard Law., Rev 818

"But there are recent decisions allowing successive suits on theories of express and implied contracts". (49).

)) Harries v. Whitworth 211 SW 2-101

"The conduct of defendant in concealing facts (75)".

5)Hyete v. Smith 272 NW 747
White v. Miley 241 PAC 670
Albaugh v. Orborne-Mc Millan 205 NW 5

"Or in preventing joinder of the issues at the previous trial (76)".

5) "Limited Bank and TrCo 2 Hunt 18 Calapp 2-112

Couch v. Couch 22 SO 2 ND 599

"Has been lead to constitute a waivure on est oppel".

"In other cases a justifcable ignorance of the facts (77)" or the law (78).

7)"Buck v. Buck 184 SW 2-68
Szombathy v. Merz 148 SW 1028

"By the plaintiff has led to the allowance of a second action".

3) White v. Adler 43 NE 2d 798
Holland v. Spear & Co., 83 NYS 2-21

"Some courts have expanded these principles into a broader policy by making exception to the rules of merger or bar where ever justice requires". (79)

Smith v. Penner 201 Pg 2d-1948
Greenfield v. Mater 194 Pg 2-1
Monagas v. Vidal 170 F2d 90 cert den 335 WS 911

"That which has not been tried, cannot have been adjudicated that which is not within the issues presented cannot be concluded by the judgement".

Slaver v. Sharp County 34 SW 262

v. Pan American Pet 55 F2d-776

mwell v. County of Sacramento 94 US 351-356

rk v. Starr 94 US 477, 485, 486

ris v. Whitworth 211 SW 2-101

C.J.S. Judgements Sec 649 and Sec. 674

h v. Merchants and Planters Bank 66 SW 918

res, Federal Practise

. 0-405(1) Pg 632

"Under the second proposition the judgement prevents the parties from relitigating those matters that were determined".

(3) Cromwell v. County of Sac 94 US 351

. 0.405.12

"Res Judicata is a sound and salutory principle - But at times there is considerable truth in the observation that res judicata renders white, black, the crooked straight".

(2) Sec. 0.405(1)

itioners response to Respondents Brief dated July 2, 1967.

APPENDIX B-B

BASIC MISSTATEMENTS BY COMMISSIONER

APPENDIX B-B

SSTATEMENT: RT PG 3, lns 20 to 34:

April 29, 1958 respondent changed its policy and increased its andard rate of pay for expert witnesses from $75.00 to $100.00 r day, ltr 4/29/58 ANM:dc:33-5-1668-1034. Appendix "A-A, relating W.A. Savage and others. The type of property involved is a gment of Mr. Pittles imagination. RT pg 42 lns 3 to 12.

ior to January 31, 1958 respondent again changed its policy and ain increased its standard rate of pay for expert witnesses from)0.00 to $125.00 per day for services performed outside of place residence of said expert witnesses: D.J. File 33-5-1919-01396 d 1396 Bernard C. Evans and Laurence Sando.

rm Lands acquired for the Casitas Dam. RT 3-8-67 pg 39 lns 9 to , pg 41. Declarations of taking deposit for Casitas Dam "2,489, 4. for 1904 ND $154,259; for 1836 ND $3,407,383. total deposit moore $3,561,642. or 148% of Casitas Dam deposit.

t Attorney Gen approved $15,000 each to Sando and Evans for vestigation and preparation for trial of Casitas Case but only 1,625. to Thomson and $12,375. to Miles for investigations and eparation for trial in the Lemoore Case inwhich deposit was 3% of deposit in the Casitas Dam Case. Miles fees were increased $100. per day on March 21, 1959.

tfs 1 - 3-8-67. The Dept of Justice paid Praekel and Leroy rnett $26,000. to appraise the Right-of-Way for a pipeline to

Department of Justice

Southern District of California

TO: THE ~~ADMINISTRATIVE~~ ASSISTANT ATTORNEY GENERAL, Los Angeles, Calif., Jan.31,
Washington, D.C. (Place and date)

FROM: Joseph F. McPherson (Name—please type)

DJ File No. 33-5-1919-0

Assistant U. S. Attorney (Title)

RE: Casitas Dam and Reservoir (Ventura River Project)

(Signature)

REQUEST

Authority is hereby requested to incur the expense described below:

Services as an expert witness of Bernard G. Evans, Real Estate Appraiser, 389 Court Street, San Bernardino, California, in the appraisal of the following properties in the above project:

Civil No. 20,267-PH, Parcels 1 and 1A (easement)
20,577-PH, Parcels 1, 2 and 3
678-57-PH, Parcels 1, 2 and 3; 4, 5 and 6
736-57-PH, Parcels 1 and 2
877-57-PH, Parcels 1, 2, 3, 4, 5 and 6
974-57-PH (one parcel)
975-57-PH (one parcel)
1089-57-PH, Parcels 1 and 2

Appraisals of all of above - flat fee $15,000.00

Pretrial conferences and court appearances to be at rate of $100.00 per day. Declaration of taking deposits for above property total $2,489,384.00.

Estimated total expense: $ 15,000.00

Contract No.

JMcP:ANM:dc

NOTE.—Instructions on the reverse hereof must be complied with fully.

AUTHORIZATION

You are authorized to incur above-mentioned expense. Date APR 4 1958

The account should be prepared on Form 5-1/2 D. C., etc.

☐ Payment should be made by the U. S. Marshal for your district from the appropriation.

☒ Voucher should be forwarded to this office for payment from the appropriation.

33-5-1919-0

Recommendation for Approval: JVB:RJI

1580128 - Salaries & Expenses
General Legal Activities 1958
Dept. of Justice

Approved:

Henry D. Rogers

Administrative Assistant ~~XXXXXXXXXX~~

CS

STATEMENT: RT Pg lns 34 to 39:

U.S. Treasury sought out petitioner as an expert witness in

. Boswell & Co. v. Commr Docket 61846, 66655; 34 TC 539 affd.

9 302F2d 682 62-1 USTC, Pg 9430; cert denied 83 S. Ct 118, in-

ch TC accepted petitioners testimony in toto affmd Ninth Circuit.

property in question abutted Lemoore and in the "back yard" of

Miles. Yet the US Treasury was willing to pay petitioner

5. per day at the time Mr. Miles was working for Dept of Justice

$75. per day. Petitioner was employed by US Treasury in DEC 58.

S-12 Pg 6 ln 15 Edison Co. Case. Expert Witnesses: W.A. Savage,

nard Evans, and Waldemar Thomson.

S-25, Pg 3 lns 28 to 35:

"Among others, Mr. Holloway Jones recommended Mr. Thomson and on December 24, 1958, replied to the inquiry from this office as follows:"

"Mr. Thomson has appeared as an Evaluation witness for the State in numerous cases both in Southern Calif and in this area. I am happy to recommend him in every way".

ple of Calif. v. Eagle Rock Properties Inc. Laurence Sando and

ter Thomson, Expert Witnesses.

ple of Calif. v. Lita S. Hurd - Bernard Evans and Walter Thomson,

ert witnesses.

3-8-67 Pg 39, ln 26, Pg 4, ln 5, Pg 41

Q: Mr. Pittle: "Now who were--what appraisers were we paying more than $75. a day to make appraisals?.

A: Mr. Thomson: "The kind of appraisers who had been on cases with me."

Q: Mr. Pittle: "Who?"

A: Mr. Thomson: "Bernie Evans, Laurence Sando".

FS 4, Para 2, lns 5 to 12:

"A copy of Mr. Thomson's qualification is enclosed. Mr. Thomson appears to be especially desirable since he is qualified to render an opinion as to the fair market value of certain mineral interests. The other appraisers heretofore employed by the acquiring agency (Praekel and Hanson) and this office (Andrews and Miles) do not fulfill this qualification. Mr Thomson has been very highly recommended by the Calif. State Highway Dept for whom he has frequently worked".

FS-12, Pg 5, Para 2, ln 1:

"I am also a member of the American Institute of Mining Metallurgical and Petroluem Engineers".

ning Engineer Erich was paid $125. per day; Pg 12 and 13; Mining gineer Moody was paid $125. per day; Pg 14; Mining Engineer Jensen s paid $125. per day; Pg 15.

NCLUSION: RT Pg 3 lns 39 to 41; Pg 4, lns 1-3 IS A MISAPPREHENSION FACT AND A MISAPPLICATION OF THE LAW.

4, ln 2:

"That offices concept of a fair price", is not before the court. What is before the court is the representation made to petitioner when petitioner was induced to make his bid of $75. per day, RT 3-11-63, Pg 26 lns 14 to 20: "And I told him that the State Dept of Highways customarily paid me $100. a day, except when I went out of the City of Los Angeles, when I was paid $125. per day. He said the government could not pay that much. He also said the highest wages they ever paid appraisers was $75. a day and that he would recommend I be employed on that basis".

th Mr. Minton and Mr. Weiser were in the hearing room at the time at respondent, Mr. Minton and Mr. Weiser, did not dare prejury the extent of denying said testimony.

3-8-67, Pg 21 lns 16 to 26; Pg 22 ln 1-4:

> "And that they had been paying me $125. a day outside of LA or San Fran and the U.S. Treasury was paying me $125. a day for work I was doing in this area. (J.G. Boswell v. Commr Supra) Mr. Minton replied that he could not pay that much - and that he would pay me the highest rate he was authorized to pay - $75.00 a day".

. Weiser, who was present in court, at the time did not dare

ejury to the extent of denying said testimony when he testified

ter.

spondent had three clear opportunities to deny petitioners test-

ony but did not dare avail itself of any of the three. The test-

ony stands uncontradicted and binding on respondent.

D CONCLUSION, Pg 3, lns 39 to 41, Pg 4, lns 1-3 IS A MISAPPLICATION

THE LAW. 30 Compt Gen 220.

ippen Materials Co. v. US 160 ct cl 357; 312 F2d-403

NCLUSION RT, Pg 4, lns 4 to 6 IS A MISAPPLICATION OF THE LAW.

> "A contractor in submitting a bid has a right to rely on positive representations made by the (gov't) agency."

F. Scholes v. US Ct Cl 1966; 357 F2d-96.

> "Such representations amount to a warrantee and establish a predicate for a possible action for breach of contract if it is later discovered that the representations are untrue".

ssison Knudson Co. v. US 128 CtCl 156, 162, 120 FS 763.

Pg 4, lns 7 to 17 IS A MISSTATEMENT. Petitioner has never

leged that respondent <u>misrepresented</u> the time required. Petitioner

ers that respondent <u>concealed</u> from petitioner the true time

quired.

"The government withholding cost information during negoteations entitled contractor to recover for a resulting loss".

gonere et al v. US 128 CtCl 156

teson Stolte Inc. v. US CtCl 4-8-1959

yder Lynch Motors v. US CtCl July 19, 1961

"The gov't no more betrays a contractor with a ruinous course of action by silence than by spoken word".

. Cardoza, J; Globe Woolen v. Unit Gas 224 NY 483, 489

lene Curtis Inc. v. US 160 CtCl 437, 443, 444.

Pg 4, ln 18: "And his constructive performance time was 140 days".

IS IS A MATERIAL MISAPPREHENSION OF FACT AND A MISAPPLICATION OF

W. Appendix A, Case 206-61.

Pg 4, lns 19-26 IS A MISAPPREHENSION OF FACT AND A MISAPPLICATION

THE LAW. Appendix A, Supra, Petitioners employment was for 155

ys in which to prepare himself to attend court as an expert

tness for respondent, an employment that did not cease with the

ling of his report, but would as he testified. RT 3-11-63, Pg 66,

s 2-4:

"At the time, August 8, 1959, that Mr. Dauber instructed me to proceed no further, I was not quite ready to testify. I would have been in another 30 days of work, possibly less. On August 3, 1959, petitioner had worked 128 days plus 30 days would be 158 days, under Bid 1 and 2, which excluded the minerals".

DEFS 4, in DEFS 2, Pg 2 para 1 and in the understanding on

nuary 6, 1959, there arose a contract implied in fact, to testify

to the minerals which both respondent and petitioner expected to

reduced to writing by a bid form prepared by Mr. Weiser and would

nount to at least 20 days of preparation for trial, of said
inerals.

ount Bros. Const Co. v. US CtCl 1953; 346F2·962

v. Dalles Military Rd 41 FS 497;

lliston on Contracts Sec. 610B Pg 534, Vol. 4.

cramento Nav Co. Salz 273 US 326

lliston on Contracts, Sec. 1293 Pg. 3691, Vol. 5.

Pg 4, lns 33 to 39. MISSTATEMENT: Apparently deveved from DEFS . (Anticipated by Reg. Counsel IRS at the time) and advice thereof mely for Mr. Weiser to arrange his trial calander accordingly. tually, the duty of petitioner to the Treasury in J.G. Boswell . v. Commr was discharged between Sept 30 and Oct 2 in conference th Mr. Mark Townsend and Between Oct 5, and Oct 9, 1959 in tendence in court as an expert witness. None of said days conicted with trials of 1836 ND and 1904 ND. The court can take dicial notice of the fact that local courts usually refrain in vor of Circuit Judges from Washington.

Pg 4, lns 29 to 33; Pg 5, lns 1 to 5: PURE SPECULATION ON THE RT OF COMMR.

Pg 5, lns 5 to 27. MISAPPREHENSION OF THE FACTS AND THE LAW AND MISAPPLICATION OF THE LAW.

titioner was not employed by respondent to perform specific praisals. Petitioner was employed to attend pre-trial conferences d attend court as respondents expert witness and to prepare himself

r said attendence. Petitioner did not seek out respondent but spondent particularly sought out petitioner. No complaint was er made to petitioner of his performance, qualifications or aracter. The only reason given the Attorney Gen. for not calling titioner for said attendence are given in DEFS 25, Pg 5, para 3, and 5, which are no reasons at all. Mr. Minton's statement, ra 3:

"Further conferences and interviews with Mr. Thomson convinced this office that the government would be better off to lose its investment ($6,750.) to June 30, 1959 (and a valuable expert witness whom respondent had gone to great trouble to procure and recommend to the attorney gen.) than to proceed further with him, as a consequence he was never notified to proceed".

3-11-63, Pg 95:

"Nobody has ever contacted me or given me any information at all as to what investigation he made".

3-11-63, Pg 98, ln 5:

"You were telling us you notified, Mr. Thomson - to get his bill in for services rendered, up to July 1959"???

A: Up to June 30.
Q: For work done up to that time?
A: For work up to that time.

3-11-63, Pg 95, lns 13 to 22: Regarding para 3, pg 5 DEFS 25Supra

Q: Did you ever call this to Mr. Thomson's attention?
A: Mr. Minton -- "I don't recall having done so".
Q: Did you have any conversation with Mr. Thomson after the first day of August 1959?
A: Mr. Minton -- "No, I don't think so".

Pg 5, ln 13 to pg 16. THE ONLY BASIS PETITIONER CAN FIND FOR NCLUSION IS IN MR. PITTIES OPENING STATEMENT, RT 3-8-67, lns 14-; PG 10, LNS 1-12. This is not evidence.

e actual policy of respondent is set out in RT 3-3-67, Pg 69,

s 4 to 10, Mr. Weiser.

E CONCLUSIONS DRAWN BY COMMR ON PG 5, LN 6 to 27, ARE BASED ON

) MATERIAL MISAPPREHENSIONS OF THE FACTS TO WIT:

1. That petitioners employment was terminated. See DEFS 25, Pg 5, Para 3.
2. That petitioners duty under his employment was completed when petitioner filed his report, See Appendix A, Case 206-61

) SAID CONCLUSION IS MISAPPREHENSION OF AND MISAPPLICATION OF

E LAW. THE LAW IS:

"So though a contract of employment contains no other express promise of the employer than to pay a stipulated compensation there is an implied promise to employ which is voilated by refusal to allow the employee to perform his duties as such".

lliston on Contract, Sec. 1293, Pg. 3684, Vol. 5.

"The rule is that a contract is to be construed, must strongly be against the party who prepares it and is applies to the US".

v. Newport News 178 F194

rrison v. US 7 Wall.688

ount Bros. Const Co. v. US CtCl 1965, 346 F2d 962

Pg 5, Para 8, lns 31 to 37 - MISAPPREHENSION OF FACT AND LAW AND

SAPPLICATION OF THE LAW.

Petitioner has proved conclusively that respondent misrespres-

ented the per diem rate.

As to concealment of a fact material to petitioners bid: RT

3-8-67, Pg 24, lns 9 to 15: - The witness (Thomson) lns 20 to 25

"The fact was concealed from me that both Mr. Minton and Mr. Weiser knew at the time it would take at least 130 days to do this job of just appraising the fee land of the 36 parcels".

Pg 25, lns 4 to 11:

Commr: "You didn't ask them"?
A: "No".
Q: "And they didn't tell you"?
A: "And they didn't tell me".

Pg 26:

Q: "You stated information was with held from you at the time you wre employed"?
A: "Yes".

Pg 27, lns 10 to 12; lns 13 to 22: RT Pg 28, lns 5 - Mr. Thomson

A: "Yes your Honor, it caused me to bid lower both in time and in price than I should have or would have if I had known the facts".

, Pg 28: Answer by Thomson:

"I would have bid for more days, your Honor. I wouldn't have bid more per day because he told me that it was the highest he could pay".

though Mr. Weiser was in court when the above testimony was pre-

nted, he did not dare perjury to deny said testimony. RT 3-8-67,

67, lns 5 to 20; see comments on RT Pg 4, ln 7 to 17, supra.

lene Curtis Inc v. US 160 CtCl 437, 443, 444

Pg 5, ln 38-9

"Plaintiff is entitled to recover, under the terms necessarily to be implied into the contract".

SAPPREHENSION OF FACT. RT Pg 6, ln 16:

"Although the job was approximately 15 days short of completion".

ere is no foundation for this misstatement in the record.

APPREHENSION OF FACT AND LAW AND MISAPPLICATION OF THE LAW.

Pg 9, lns 25-29. There is nothing in the decision of 3-18-66 in the law of contracts to support this misapplication of the law. d misapprehension is based wholly upon Commr continuing mis-rehension of the prime object and purpose of petitioners employ-t. The prime object and purpose of petitioners employment by pondent was <u>not</u> the making of an appraisal and the filing of a ort, as fixed in the mind of Commr, but to attend court as res-dents expert witness in the trials of the parcels sought in 1836 and 1904 ND and petitioners duties under said employment were not ected to be completed until Sept 6, 1959. See discussion Report 4, lns 19-26 supra.

Pg 10, lns 1-13. THERE IS NOTHING IN THE RECORD EXCEPT THE TEMENT OF MR. PITTLE TO SUPPORT THIS CONCLUSION. See Discussion ort Pg 5, lns 13 to 16 supra.

Pg 10, Para 7, lns 1 to 7: REPORT Pg 11, lns 1 to 16: PURE CULATION BY COMMR. See Discussion RT Pg 4, lns 33 to 39, supra.

3-8-67, Pg 34, lns 20 to 26; Pg 35 lns 1 to 12:

Q: "Mr Thomson from Aug 8, 1959 to Jan 1, 1960, did you hold yourself in readiness to testify"?
A: "Yes, except for seven business - court days. I was on trial in Boswell case for four days and in conference with Mark Townsend, three days".
Q: "During that seven or eight days, did you receive and request to testify in the case you were working on"? (1836 ND and 1904 ND)
A: "No".
Q: "Out of Minton's Office"?
A: "No. I had already told Mr. Weiser at the inception of this thing, that I would have to testify for the Treasury that

Pg 11, lns 18-21 MISSTATEMENT. Mr. Weiser knew on Jan 6, 1959 petitioners obligation to the Treasury and that trial of J.S. swell v. Commr would be held on Oct calander of the Judge from shington.

Pg 11, lns 21-26 MISSTATEMENT: Respondent never indicated that stop-order was other than temporary; awaiting approval of the torney Gen.; or ever indicated to petitioner that petitioner would t be called as an expert witness; the object of petitioners employ-nt.

3-8-67, Pg 32, ln 18:

"Did anybody ever tell you that you were not going to be used as a witness"

3-8-67, Case 206-61 Pg 32, ln 8: Answer - Thomson:

"I had no reason to believe other than that I would be called. It would seem to me stupid not to call me".

3-8-67, Case 206-61, lns 13 and 14:

"And it seemed incredible to me that the gov't would go to the trouble it did to hunt up an expert witness and then not use him".

Pg 12, para 9, ln 3 - irrelevant and immaterial to situation of expert witness employed by Dept of Justice, and based on the revelant, immaterial, irresponsible heresay testimony of Robert Rowe, over petitioners objections.

Pg 12, para 10 to ln 1, pg 13: THIS IS THE SAME MISAPPREHENSION the object and purposes of petitioners employment fixed in mmrs mind as making of an appraisal and filing an appraisal rpt.

e discussion under RT Pg 5, lns 6 to 27, supra.

Pg 13, lns 4 to 9, PRE-TRIAL MIS-STATEMENT. See discussion RT 3, lns 20 to 34.

Pg 13, lns 9-21 - MIS-STATEMENT. See discussion RT, Pg 3, lns -24; lns 34 to 39, supra.

Pg 13, lns 22-25 MISAPPLICATION OF THE LAW. See discussion Pg 4, lns 4 to 6, supra.

, PG 13, lns 25 to 29 MISAPPREHENSION OF THE FACTS. See discussion Pg 3, lns 39 to 41, Pg 4, ln 1 to 3, supra.

Pg 14, ln 20 to 26 IS A MISAPPLICATION OF THE FACTS AND OF THE W.

APPENDIX C-C

POST TRIAL FILINGS BY PETITIONER, INCOPORATED INTO TRIAL BY REFERENCE.

APPENDIX C-C

. Original petition of May 29, 1965

. First ammended complaint of April 15, 1967

. Petitioners objection to motion to dismiss Case #174-65 of June 26, 1965

. Reponse to Pre-trial Order of August 3, 1965, undated

. Plaintiffs requested findings of fact of April 7, 1967.

. Motion to strike portions of respondents brief of June 16, 1967

. Opposition to defendants proposed conclusion of law June 16, 67

. Opposition to defendants proposed findings of fact - JUL 2, 1967

. Motion to strike of July 2, 1967.

. Petitioners response to respondents brief which was concluded in respondents requested findings of fact Pgs 7-11 of Jul 2, 67

. Opposition to defendants proposed findings of fact of Jul 2, 67

. Ltr of July 12, 1967

. Petitioners comments as to defendants comments and objections to petitioners proposed findings of fact of July 12, 1967

. Petitioners brief in support of petitioners 1st amended complaint.

APPENDIX D-D

FACTS ESTABLISHED BY DECISION OF COURT

3/18/66 AND REPORT OF COMMISSIONER.

APPENDIX D-D

ts Established in Decision of March 18, 1966:

That a contract was established.

The US Attorney at Los Angeles is a Contracting Officer in

in procurement of "Expert Witnesses".

The Contracting Officer definetely needed plaintiffs' services as an "expert witness" in cases 1836 ND and 1904 ND; and sought out petitioner to fill said need and that petitioner was his man for the task.

At the inception of his employment, petitioner was dealt with as a potential expert condemnation witness..

Time was of essence of petitioners employment.

Petitioner is a Mining Engineer and a member of the American Institute of Mining Engineers. On many occasions petitioner has performed appraisal services for oil companies and private industrials involving oil & other mineral rights in various parts of the country.

The Bid Forms were prepared by respondent.

Where a state of facts exist from which an implied contract -- maybe justly inferred -- the court of claims has jurisdiction--.

The gov't did not establish that -- there was a reasonable likelehood that plaintiff could have become gainfully employed in order to mitigate damages.

Plaintiff -- customarily was paid $125. per day for appraisal services rendered away from his residence.

The U.S. Attorneys Office had paid other appraisers $50.(SIC) to $150. per day for their services.

An appraiser who is engaged to render an appraisal report in connection with a prospective condemnation trial is usually called as a witness at such trial and paid therefore.

No dissatifaction with the quality of plaintiffs' services was expressed before or later.

On Jul 19, 1965 the court denied without prejudice, defendants motion to consolidate both petitions for arguement.

However, it is usually intended that an appraiser engaged in connection with a condemnation action will testify at trial, (if needed SIC) and an appraiser is not usually discharged before completing his contract, except for cause.

Evidence indicates that another appraiser (Miles) attended pre-trial conferences and trial sessions for no more than 133 days (and probably much less) at various times scheduled from August 4, 1959 (SIC) to July 21, 1964.

For he maintained his offices in his living quarters in San Francisco.

. It is not proven that plaintiff was offered any such employment in that period.

. Plaintiffs customary compensation for appraisals outside of his San Francisco Headquarters was at the rate of $125. per day. He had done and was doing appraisal work for the U.S. Treasury at that rate.

. Unknown to plaintiff the U.S. Attorney paid from $50.(SIC) to $150. per day for appraisal services at relevant times.

. Plaintiffs qualifications seemed impressive enough on paper.

. He was qualified to appraise Mineral rights that Mr. Miles (or others).

. However, the defendants witnesses who participated in the contract negotiations (Menton and Weiser) did not catagorically deny the plaintiffs contention: (that the contracting officer misrespresented to petitioner that the highest rate he was authorized to pay was $75. per day).

. It was defendants intention in engaging plaintiffs appraisal services that he (plaintiff) should file an appraisal report, attend pre-trial conferences, and testify at condemnation trials.

. Time was of essence because the U.S. District Court was pressing the U.S. Attorney to bring the condemnation cases to trial by September 1, 1959.

. Plaintiff was under the justificable impression that the appraisal work had to be completed appreciable prior to trial date.

. Plaintiff had advised defendant on July 28, 1959 that he could be ready to testify by Sept 8, if he worked every day until then.

. It is indicated in plaintiffs exhibits, 21 to 23, that pre-trial conferences and trial sessions as to the two condmnations cases were scheduled at various times for the period, Aug 24, 1959 (SIC) through Jul 21, 1964, for a total of approximately 133 days.

APPENDIX E-E

AUTHORITIES OF RESPECTIVE QUESTIONS RAISED

(NUMBER OF AUTHORITY EQUALS NUMBER OF QUESTION)

APPENDIX E-E

' APPLICABLE TO RESPECTIVE QUESTIONS RAISED:

I

OCATION OF 5TH AMENDMENT

ch v. US 292 US 571

II

ITABLE JURISRACTION OF CT CL TO REFORM CONTRACTS.

cliffe Storage & Wharehouse Co v. US 125 CtCL 297; 112 FS 570

Boston Iron Wks v. US 34 CtCL 174

liam Camp v. US 239; US 221; 33 S. Ct 70

r Elect Co. v. US 60 CtCL 993

re & Trust v. US CtCL 364, 367

III

UIT SUBSEQUENT MAY BE BROUGHT

tatement of Judgements, Sec. 62(b), pg 256, para. 2

Judicata 65 Harv Law Rev (75)(76)(77)(78), pg 830

IV

ENDANT IS ESTOPPED FROM RAISING RES JUDICATA

te v. Alder (1942) 289 NY 34; 43 NE 2d 198

tatement of Judegments, Sec. 62(b), pg 256, para. 2

Judicata 65, Harv Law Rev 818, 830

ris v. Whitworth 211 SW 2d 101

e v. Smith 272 NW 747

te v. Miley 241 PAC 670

augh v. Osborne Mc Millan 205 NW 5

ted Bank & Trust v. Hunt 18 Cal App 2d 112

nbatty v. Marz 148 SW 1029

land v. Spear 83 NYS 2d 21

ch v. Pinner 201 P 2d 1948

enfield v. Mather 194 PAC 2d 1

gas v. Vidal 170 F 2d 90

green v. Numan 141 F 2d 927, 929

ver v. Sharp 34 SW 262

es Federal Practics, Sec. 0, 443

well v. Sac. Co. 94 US 351

Shoe Machy v. US 258, US 451

oid v. Medco Inv. 320 US 661

V

ESPRESENTATION IS GROUND FOR REFORMATION

ison Knudsen v. US 128 CtCL 156; 120 FS 168

ch Banking v. US 342, US 893

Comptroller Gen 220

liffe Stge & Whse v. US 125 CtCL 297; 112 FS 570

liston on Contracts, Sec. 1487, pg 4153, Vol. 5.

in on Contracts 467-3A

ide & Wachtel - Government Contracts 13:110

pen Materials v. US 312 F 2d 408

ashnick v. US 123 CtCL 197; .105 FS 837

Water Proofing v. US 133 CtCL 911; 137 FS 713

rison Knudsen v. US 170 CtCL 712; 345 F 2d 535

zier Davis Const Co. v. US 100 CtCL 120

vey v. US 8 CtCL 501, 512, 513

Boston Iron Wks v. US 105, US 671

v. Jones 131, US 1, 14, 19

v. Miliken 202 US 168, 173, 174

liam Camp v. US 239, US 221, 227, 233

erlind v. US 240, US 531, 533, 534

tsville Oil Mill v. US 271, US 40, 49

elhurst Oil Mill v. US 70 CtCL 334, 346, 347

und J. Rappolie v. US 98 CtCL 499

ering v. Garrisgues 75 CtCL 574

v. Atlantic Dredging 253 US 1

lisbach v. US 233, US 165

VII

CEALMENT IS GROUND FOR REFORMATION

de Woolen v. Utica Gas 224 NY 483; 121 NE 378

ene Curtis Inc v. US 160 CtCL 437, 443, 444

zier Davis Const Co v. US 100 CtCL 120

eson Stolte Inc v. US CtCL April 8, 1959

der Lynch Motors v. US CtCL 7-19-1921

onere v. US 125 CtCL 156

Scholes v. US CtCL 1966; 357 F 2d 963

ering v. Garrigues 75 CtCL 566

rison Knudsen Const Co v. US 128 CtCL 156, 162; 120 FS 768

v. Spearin 248 US 132, 137

Water Proofing v. US 133 CtCL 911, 915; 137 FS 713

ole Midwest v. US 125 CtCL 818-113 FS 278

unt Bros Const Co v. US CtCL 1965; 246 F 2d 962

v. Atlantic Dredging 253 US 1

rison Knudsen Const Co v. US 345 F 2d 535

ond J. Rappolie v. US 98 CtCL 499

Boston Iron Wks v. US 105, US 671

v. Jones 131 US 1, 14, 19

v. Milken 202 US 168, 173, 174

liam Camp v. US 239, US 221, 227, 233

VII

TRACT IMPLIED IN FACT

den v. Austin 5QB 671, 683 per Lord Denman

tty on Contracts, Sec. 148, pg 74

liston on Contracts, Sec. 94, pg 338, Vol. 1.

tetter v. Park 137 US 30

ers v. Beadle 183 Cal App 2d 691

TRACT INCLUDES NECESSARY IMPLIED PROVISIONS

liston on Contracts, Sec. 610, pg 533, 534, Vol. 4.

CJS, Sec. 328

) Navig v. Salz 273 US 326

v. US 117 CtCL 552

:ley v. US 133 CtCL 226; 135 FS 542

.iston on Contract, Sec. 1293, 1293a, Vol. 5.

. Speed 75 US 94

ican La France v. Shenandoah 115 F 2d 866

. v. Waxberg 237 F 2d 936

ruff v. New State Ice 197 F 2d 36

:in v. Campanaro 156 F 2d 127

or Spailing Steel v. Slater

VIII

THREE CONTRACTS CONSTITUTE ONE CONTRACT

rately executed instruments by same parties as to same subject

ne contract.

mus v. Westmoreland 120, Cal App 2d 537

ion 1642 Cal Civil Code

speed v. Gr. West Power 33 Cal App 2d 245

.eson v. Nev Mutual 86, Cal App 342

s v Lux 11[illegible] [illegible] App 21

h v. Bank of America 2 Cal App 2d 214

:ley v. Fisk 179 Cal 748, 754

1646 Cal Civil Code

banks Morse v. Consol Fish 190 F 2d 817

1642 Cal Civil Code

PE OF AUTHORITY AND RANGE OF DUTIES OF EXPERT WITNESS

t v. Miller 115 PAC 932

ner v. Rozelle 45 PAC 2d 561

X

TRACT MUST BE CONSTRUCED AGAINST DEFENDANT

v. Newport News 178 F 194

rison v. US 7, Wall. 688

unt Bros Const Co v. US 346 F 2d 962 (CtCL 1965)

ebe & Sons v. US 332 US 407

ch v. US 292 US 571

Op Atty Gen 555

edman v. US 314 F 2d 506

tern Contrg v. US 144 CtCL 318

TRACT WILL NOT BEAR LITTERAL INTERPRETATION

liston on Contracts, Sec. 610, pg 533, Vol. 5.

XI

PRIME OBJECT AND PURPOSE OF PETITIONERS EMPLOYMENT

liston on Contracts, Sec. 619, pg 733(6), Vol. 4

x v. Amer Malt 169 F 582

n v. Towne 5 Wall. 689, 699

Gar Mfg Co v. US 199 CtCL 60; 351 F 2d 972

Casualty v. Sinclair 108 F 2d 65

let Embroidery v. Derwent 254 NY 179

-Nev RR v. US 127 FS 547

ıder Const v. US 186 CtCL 58-4-6-60

XII

CLEAR INTENTION OF THE PARTIES

lin v. Austin 5 QB 671, 683 per Lord Denman

:ty on Contracts, Sec. 148, pg 74

liston on Contracts, Sec. 94, pg 338, Vol. 1.

v. Laxberg 237 F 2d 936

ınt Bros Const Co. v. US (CtCL 1953) 346 F 2d 962

Amer Phillips v. US (CtCL 1966) 358 F 2d 980

E WAS AN ENFORCEABLE OBLIGATION UPON PLAINTIFF

3 and DEFS 8, so specify

2, so specifies

4; 5, 13 and 14, so specify

object and purpose, the clear intent, the manifest contemplation

oth parties at the inception of the contract all constitute an

rceable obligation on plaintiff.

. Maryland Gas Co 64 FS 522

r Mill of Amer v. US 72 FS 603 (CtCL)

o Falls BP v. US 107 FS 952

ttas v. US 60 FS 171

Trading v. US 172 FS 165

liston on Contracts, Sec. 1293, pg 3691, Vol. 5.

Casualty Co v. Sinclair 108 F 2d 65

let Embroidery Co Inc v. Durwent 254 NY 179

field v. Stocco Homes Inc. 26 NY 246

liston, Sec. 610B

tetter v. Park 137 US 30

XIV

RE WAS AN EQUALLY ENFORCEABLE OBLIGATION ON DEFENDENT

re & Trieste v. US 43 CtCL 364, 367

ly v. US 31 CtCL 361

holas Ittner v. US 43 CtCL 336

e Pro Equip Co. v. US (CtCL 1965) 347 F 2d 509; 384 US 917

ur Mills of Amer v. US CtCL 7-7-47-72 FS 603

Canal Co v. Hill Wall.94

at Nor RY v. US 236 F 433

liston on Contracts 1293, pg 3684, Vol. 5.

son Trans v. Jaffa 143 F2d 340

Flood v. Bates 283 F 367

llers Case 19 CtCL 581

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'UAL REFERENCES TO RECORD

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: ENFORCEABLE OBLIGATION ON PLAINTIFF

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QUALIFICATIONS OF PLAINTIFF AS EXPERT WITNESS

A. Expert Witness for Treasury at $125. per day in JG Boswell v. Comms in 1959. RT 3-8-67, pg 5, ln 25; RT Pg 21, ln 25

B. Expert witness for Cal Div of Highways at $125. per day. RT 3-3-67, pg 21, ln 21

C. Usual fee at $125. per day - Commr RT DEFS 4; DEFS 25, pg 3, para 2 & 3.

D. RT 3-3-67, pg 39, ln 26; pg 40, lns 26 to 41 to ln 1-26; pg 40, ln 5, also in cases with L. Sando & Bernie Evans.

MISREPRESENTATION AS TO PRICE PER DAY

RT 3-3-67, pg 39, lns 19 to 40, ln 26 to pg 41, ln 26 to pg 42, ln 4

RT 3-8-67, pg 22, ln 1 to ln 4; RT 3-8-67, Pg 5, lns 2 to 8.

untruth of said representation is proved in RJL-C MAC M 33-5-3-698 & 1034 stated 4/29/59 - attached to appendix B. Also, Minton and Mr. Weiser were in court on 3-11-63, when plaintiff testified and Mr. Weiser on 3-8-67, when plaintiff again so tified. But neither one dared perjury to the extent of itting said testimony. Comms report stated that neither denied l testimony categorically.

RT Pg 62, lns 21 to pg 63, ln 17; pg 64, lns 1 to 4

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t known to plaintiff on 3-11-63 when introduced by Mr. Pittle

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ed by Mr. Weiser on 3-8-67, Pg 67, ln 17-20.

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DEFS 8, RT 3-8-67, pg 5, ln 5; pg 7; ln 19;

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AL CONTEMPLATION OF PARTIES

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RT pg 38-67, pg 5, ln 15; pg 6 & pg 7; RT 3-8-67, pg 31 ln

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DEFS 3; DEFS 8; Prime object and purpose of employment; mutual intention of parties, mutual contemplation at initiation of contract. Plaintiffs' understanding. RT 3-3-67, pg 6, ln 17 to ln 3, pg 7; pg 7, lns 12 to 19; RT pg 31, ln 12 to pg 32, ln 17, RT Pg 33, ln 18 to 21; RT 34, ln 1 to 11; PG 34, ln 22 to 26; pg 45, lns 22-26; pg 46, ln 1-4. RT pg 49, lns 1 to 9; RT pg 53, lns 10 to 15; RT Pg 36, lns 17 to 26.

NO. 22112

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
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IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, for a violation of Title 18, United States Code, Section 2114, armed robbery of a Postmaster (Wagner v. United States, 264 F. 2d 524 [9th Cir. 1959]). Following a jury trial, the appellant and his two co-defendants were sentenced to the custody of the Attorney General for twenty-five years (Wagner, id.). An appeal was taken from the above conviction and the conviction affirmed (Wagner, id.).

In 1965 appellant filed a motion pursuant to §2255, which

motion was denied, and affirmed on appeal (Wagner v. United States, 374 F.2d 86). Appellant filed the subject §2255 motion on March 29, 1967 [C.T. 2]. 1/ Following an Order, filed April 21, 1967 [C.T. 15], the appellant filed an Amended Petition pursuant to Section 2255 of Title 28, U.S.C. [Supplemental Clerk's Transcript]. On May 23, 1967, there was filed an Order Dismissing Petition pursuant to Section 2255, Title 28, U.S.C. [C.T. 17].

A Notice of Appeal was filed June 20, 1967 [C.T. 20].

The District Court had jurisdiction under the provisions of Title 18, U.S.C. Sections 2114 and 3231, and Title 28, U.S.C. Section 2255.

This Court has jurisdiction pursuant to Title 28, U.S.C. Sections 1291, 1294 and 2255.

II

STATUTE INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was brought under the provisions of Title 28, U.S.C. Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws

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1/ C.T. refers to Clerk's Transcript.

of the United States . . ., or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence. . . .

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Whether a hearing is required when only bald conclusions are made in a §2255 motion.

2. Whether appellant may raise the same ground urged in his direct appeal from conviction, and also rejected in a previous §2255 appeal.

3. Whether there was an ex parte hearing in this matter.

B. Statement of Facts

On the afternoon of December 19, 1955, at about the hour of 2:30 P. M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks

in a bank at Bellflower, California [R. T. 104]. [2] They proceeded from the Post Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. T. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted: "a man accosted Martin with a gun . . ." [R. T. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. T. 107]. Postmaster Martin identified such person as co-defendant Vandergrift [R. T. 254-255]. Martin testified that this person, Vandergrift, " . . . approached on my side and stuck a gun in my side and demanded my gun" [R. T. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's gun [R. T. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. T. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. T. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. T. 256].

Bonner testified that the man on his side of the auto also had a gun [R. T. 107]. That this person demanded the money. This person, Bonner identified as the appellant Wagner [R. T. 108]. Bonner testified that he was certainly apprehensive of his life and was in fear when the gun was pointed at him and that he believed

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2/ R. T. refers to Reporter's Transcript.

the men meant business [R. T. 109]. Bonner testified that the "man", "Wagner", took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. T. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Postmaster Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the co-defendant Cambiano [R. T. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. T. 259-260].

Witness Bonner stated that there was a "7-UP" truck double parked on the street at the time they [he and Martin] went into the parking lot [R. T. 149]. That he later talked to the driver of this truck [R. T. 150]. That the "7-UP" man gave to him, Bonner, the license number of the get-away car [R. T. 178].

The witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. T. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. T. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. T. 228]. That this person was close to him, about four or five feet -- that he had blue eyes [R. T. 229]. Hunt described the get-away car as a " '50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan"

[R. T. 229]. Hunt observed the driver of this car and identified him as defendant Cambiano [R. T. 230]. Upon cross-examination, he again identified Cambiano and gave a description of him as he remembered him [R. T. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. T. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. T. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car " . . . and stuck a gun in my side and demanded my gun" [R. T. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. " . . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. T. 257]. That this person did not then have a mask on [R. T. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. T. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. T. 260].

IV

ARGUMENT

A. NO HEARING IS REQUIRED WHEN A PETITION MERELY CONTAINS A BALD CONCLUSIONS.

Judge Byrne found that the petition contained bald conclusions. The Order from which the appeal is taken states,

> "The petitioner has now filed an amended petition but he still does not allege any facts. . . ."

At the time of appellant's direct appeal this Court found that the prosecution had no duty to produce the "7-Up Man" [Wagner, supra, at 351]. Presently appellant claims that the evidence was "suppressed". He claims the witness was hidden from Wagner, and therefore, he had no access to the man - contrary to what this Court earlier found.

Conclusory allegations do not require the holding of a hearing. Sanders v. United States, 371 U.S. 1, 19 (1963). Appellant has refused to allege basic facts in support of his allegations.

B. APPELLANT IS FORECLOSED FROM LITIGATING GROUNDS WHICH HAVE HERETOFORE BEEN ADJUDICATED.

The ground urged in the instant proceeding was raised in the direct appeal from appellant's conviction. That ground is the

government's non-production of the "7-up man". Appellant now claims the witness was suppressed. Appellant is alleging an identical ground supported by a different legal argument which, clearly, is not permitted under a Section 2255 motion. Sanders, supra.

The April 21 order of the trial court [C. T. 15] permitted appellant an opportunity to allege that it was not the "7-Up man" to whom appellant was referring in the instant proceeding. Said opportunity was met with a refusal to state the name or identity of the witness [C. T. Supplemental]. When appellant refused to state the required information, Judge Byrne's finding at page 2, lines 11-19, of the May 23 order [C. T. 17-18] is the only reasonable finding. Appellant is simply attempting to re-litigate the "7-Up man".

In any event, when a second motion to vacate is brought, the trial court has discretion to deny relief as to those allegations which could have been, but were not, raised in earlier proceedings unless the petitioner alleges some justifiable reason why he was unable to do so previously. Williams v. United States, 197 F. Supp. 198 (D. C. Ore. 1961).

C. THERE WAS NO EX PARTE HEARING IN THIS MATTER.

Appellant claims, without citing proof, that there was an ex parte hearing by the District Court. Not only is there no proof of such a hearing, but there was no hearing.

D. APPELLANT'S MOTION WAS DECIDED BY THE CORRECT JUDGE.

Appellant complains about the judge who entertained the instant motion. Title 28, U.S.C., Section 2255 provides that the motion shall be made in "the court which imposed the sentence . . . ."

Appellant refers to the case of Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), as requiring the disqualification of Judge Byrne in the instant matter. In Halliday, the First Circuit held that where the challenge was made to a prior determination of a judge as to the voluntariness of a plea, then the judge accepting the plea should be disqualified from hearing the §2255 motion. The First Circuit, at 273, stated that the plea judge should not be the trier of fact of "his own credibility". There is no parallel in the instant matter.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

No. 22116

United States Court of Appeals
For the Ninth Circuit

MISTER DONUT OF AMERICA, INC.,
APPELLANT,

v.

MR. DONUT INC., ET AL.,
APPELLEES.

PLAINTIFF-APPELLANT'S BRIEF

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MR. DONUT INC., ET AL.,
APPELLEES.

PLAINTIFF-APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal by the plaintiff-appellant Mister Donut of America, Inc., from a final judgment of the district court dated May 2, 1967 dismissing its Complaint and Supplemental Complaint for trademark infringement, unfair competition and dilution of plaintiff's trademark. (R. 584)[1]

Jurisdiction of the district court was based upon provisions of the Trademark Act of 1946, 15 U.S.C. §1121, 1125(a), 1125(b), 1126(b), 1126(h), and 1126(i) the provisions of 28 U.S.C. 1338(a) and (b) (R. 2, 199), and diversity of citizenship, the value of the subject matter in controversy with respect to each defendant exceeding the sum or value of $10,000.00 exclusive of interest and costs. (R. 2, 199).

[1] "R" refers to the Transcript of Record, volumes 1 to 3.

Plaintiff pleaded and defendants admitted that it was a corporation incorporated under the laws of the Commonwealth of Massachusetts with its principal place of business in Massachusetts and that the defendants-appellees were individuals residing in, proprietorships doing business in, and a corporation operating in the State of California (R. 2, 3, 16, 17, 199, 200, 261, 262, 389 and 390). Plaintiff also alleged and defendant admitted plaintiff's ownership of United States Trademark Registrations Nos. 683,370, 427,509, 668,784, and 673,298, the infringement of which is in issue (R. 4, 5, 6, 201, 203, 395).

This Court has jurisdiction to review the judgment of the district court under the provisions of 15 U.S.C. § 1121 and 28 U.S.C. § 1291 and 1294.

PROCEEDINGS BELOW

This action is for trademark infringement of plaintiff's common law, federal and state statutory rights, unfair trade practices and unfair competition. The Supplemental Complaint alleges defendants infringe plaintiff's federally registered trademarks Mister Donut and Mr. Donut by operating and franchising seven Mr. Donut shops in Orange County, California. (R. 199). The defendants generally denied the allegations of the Supplemental Complaint (R. 261) and in addition asserted several affirmative defenses including: good faith adoption of the mark Mr. Donut; that the defendants' activities are purely local in nature and therefore not amenable to regulation under the Lanham Act;[2] that plaintiff's acquisition from a third party of a federally registered Mr. Donut mark prior to the defendants' use thereof was invalid and that plaintiff was

[2] The Lanham Act is the popular name for The Trademark Act of 1946, Chapter 22 of Title 15 of the U.S. Code, 60 Stat. 427.

guilty of fraud in acquiring federal trademark registrations. The defendants also asserted a Counterclaim which substantially embodied its affirmative defenses and, *inter alia*, sought an injunction against use by plaintiff of MR. DONUT in California. (R. 261).

Following substantial pretrial discovery, both parties filed motions for summary judgment (R. 110, 173) which were heard initially on April 26, 1965, and then continued for further hearing on May 24, 1965. Following the first hearing the plaintiff was given leave to and did file its Supplemental Complaint (R. 199). On August 4, 1965, both plaintiff and defendants motions for summary judgment were denied on the grounds that there were genuine issues of fact (R. 286). Following further discovery including depositions, a Pretrial Conference Order was filed in which the civil action was dismissed against Eugene and Bonnie Peterson and Earl R. Power without prejudice, and the Mr. Donut Shop at 1232 South Bristol Street, Santa Ana, California was deemed to be MR. DONUT, INC., a California corporation, which was organized during the course of these proceedings (R. 389, 415).

After trial on the merits without jury from January 10, 1967 until January 12, 1967, and submission of the case on brief, the district court made an Order for Findings of Fact, Conclusions of Law and Judgment on March 23, 1967 (R. 509); and on May 2, 1967, the district court issued its Findings of Fact and Conclusions of Law and a Final Judgment dismissing the Complaint and Supplemental Complaint and the Counterclaim (R. 576, 584). On May 31, 1967, plaintiff filed its Notice of Appeal and on June 13, 1967, the defendants filed their Notice of Cross-Appeal (R. 585, 595).

STATEMENT OF FACTS

INTRODUCTION

The plaintiff, Mister Donut of America, Inc. (by change of name from Harwin Management Corp.) was organized under the laws of the Commonwealth of Massachusetts on June 27, 1955 (R. 576). The defendants include Mr. Donut, Inc., a corporation of the State of California, David K. Jones, principal stockholder and President of Mr. Donut, Inc., his wife Helen L. Jones and Berta Ramos, a franchisee of one of the defendants' Mr. Donut shops (R. 576).

Plaintiff Has Used Mister Donut Since 1955 And By The Time Of Trial Was Operating Or Franchising About 200 Shops From Massachusetts To California.

Plaintiff commenced using the mark Mister Donut about August 1955 shortly after it was organized as Harwin Management Corporation (R. 578). It first used Mister Donut in the operation and franchising of donut shops in Massachusetts and New York (R. 578). Prior to October 1957, the earliest date upon which any of the defendants claimed to have adopted Mr. Donut, the plaintiff had in operation five franchised Mister Donut shops in the states of Massachusetts and New York (R. 578, 580). The plaintiff's business spread steadily southward and westward. In 1958 shops were opened in Florida, Michigan and Virginia (R. 578). In 1960 a shop was opened in Ohio; in 1961 shops were opened in Connecticut and Illinois; in 1962 shops were opened in Delaware, Georgia, Indiana, Pennsylvania and New Jersey (R. 578). In 1963 a shop opened in Minnesota (R. 578). In 1964 shops opened in Nebraska, Maine, Kentucky, Ohio, Colorado, West Virginia and Wisconsin (R. 578). By the time of institution of this civil action in 1964 there were approximately one hundred and twenty five MISTER DONUT shops in twenty states (R. 578). By the time of trial there were approximately two hundred MISTER DONUT shops operating in thirty states, including five in California (R.T. 56).[3]

BY THE TIME OF TRIAL PLAINTIFF WAS NOT ONLY ACTIVELY OPERATING AND BUILDING MISTER DONUT SHOPS IN CALIFORNIA, BUT ALSO HAD EXPERIENCED ACTUAL CONFUSION AND LOSS OF BUSINESS BECAUSE OF DEFENDANTS ACTIVITIES IN ORANGE COUNTY.

Plaintiff's five MISTER DONUT shops in operation in California at the time of trial were located in Campbell, Sacramento and San Jose (R. 578). In addition plaintiff had several other MISTER DONUT shops under construction (R. 578). Plaintiff's activities in California had assumed substantial proportions long prior to trial. It opened a Western Division office in Palo Alto, California to handle its Western activities in 1965 (R. 578). It advertised for franchisees in national publications reaching California as early as 1957 (R.T. 157 to 159, Ex. 59).[4] Substantial testimony was offered that plaintiff not only was actively soliciting sites for MISTER DONUT shops in Orange and Los Angeles County (R.T. 61-63) but that it had received a number of substantial deposits from people in Los Angeles who are now waiting for available shops (R.T. 64, 82, 83). In connection with its expansion in California plaintiff has advertised for franchisees and shop sites in Southern California in regional publications (R.T. 68, 71-73, Ex. 104, 110-112, 116, 117). These ads and publicity releases received substantial response, resulting in many inquiries

[3] "R.T." refers to the Reporter's Transcript of proceedings.

[4] Ex. refers to Exhibits offered at trial. Plaintiff's exhibits are numbered. Defendants' exhibits are alphabetical.

in addition to the deposits actually accepted (R.T. 69-71, Ex. 105). Actual negotiations for site locations have been negotiated in Orange County and in Los Angeles County (R.T. 74-81, Ex. 108, 113-116). Very early interest in obtaining at least one Mister Donut franchise from plaintiff in the Los Angeles area was expressed by a business man Carlos T. Parker from Iowa and his daughter Geraldine Messinger who indicated a desire to open at least one Mister Donut shop in the Los Angeles area. (R.T. 283-315). Substantial interest was expressed by others, including a retired naval officer, John E. Sullivan (R.T. 245 to 261). These individuals refrained from pursuing franchise negotiations with the plaintiff only when they learned of defendants' activities in Orange County (R.T. 253, 256, 295 to 297, 309, Ex. 76, 93). These witnesses also indicated it was the likelihood of confusion with defendant that was the only reason for not wanting to procure a franchise from plaintiff. Plaintiff had also delayed its developments in Orange County and Southern California in part because of defendants' activities (R.T. 84).

Long Prior To Defendants' Use Of Mr. Donut Plaintiff Took Every Possible Step To Assert National Ownership Of Both Mr. Donut And Mister Donut By Filing Several Applications For Federal Registeration And By Purchasing A Registration Of Mr. Donut And Recording That Purchase.

Promptly after the plaintiff adopted the mark Mister Donut it took all steps available to it to assert national ownership of this mark for use in connection with its business. These steps included the filing of four applications for registration under the Lanham Act, the good faith purchase for valuable consideration of an earlier registration of the mark Mr. Donut (Ex. 4), and the recording of that assignment (Ex. 5; R. 580), and the recording in the Patent office of the plaintiff's change of name from Harwin Management Corp. to Mister Donut of America, Inc. (Ex. 1). The four applications filed by plaintiff included three filed in 1955 (Ex. 3, 7 and 9). Two of these applications matured into registrations 668,784 (Ex. 3) and 673,298 (Ex. 9), which are now incontestable under the provisions of 15 U.S.C. 1065. Registration 668,784 was for MISTER DONUT used in connection with snack bar services. Registration 673,298 was a logo of a donut man used in connection with snack bar services. In addition plaintiff filed an application for federal registration of MISTER DONUT for flour, filling and jellies for donuts, coffee and vegetable shortening in October 1957 which issued on August 11, 1959 as Registration No. 683, 370 (Ex. 2). This latter registration is also incontestable under 15 U.S.C. §1065.

Registration 427,509 for the mark MR. DONUT and a design, registered on February 11, 1947 for donuts to Finis L. Ragsdale of Everett, Washington, (hereafter referred to as the Ragsdale registration) was acquired from Ragsdale's widow as executrix of his estate by an assignment dated July 17, 1956 when plaintiff's own application for registration of MR. DONUT, filed August 24, 1955, was rejected by the Patent Office because of this prior registration (R. 580, Ex. 5, 6 p. 5, 6). The assignment to plaintiff was recorded in the United States Patent Office on July 23, 1956 more than a year before the date that defendants first started to use the mark MR. DONUT. At the time of this assignment and recording, the Ragsdale donut business was still in operation and the mark MR. DONUT was still in active use as outlined below. And although the assignment recited a transfer of good will for valuble consideration, the district court held that since plaintiff did not receive a customer list, merchandise, equipment, recipes or goods from the assignor there was no transfer of good will (R. 580).

At The Time Plaintiff Purchased The Ragsdale Registration The Mark Shown In That Registration Was In Active Use By Jean Ziebell Who Acquired The Ragsdale Donut Operation But Never Recorded Any Assignment Of The Registration In The Patent Office.

The district court further held with respect to plaintiff's Ragsdale Registration that Finis L. Ragsdale owned the Everett Super Market in Everett, Washington. During his ownership of this Super Market, Ragsdale leased a donut shop on the premises to Mrs. Jean Ziebell which was operated under the name Mr. Donut. He sold the market to Harold L. Cohen on or about February 14, 1951. Mr. Cohen within a few days thereafter sold the entire Ragsdale donut operation to Mrs. Jean Ziebell. In conjunction with the Ragsdale donut operation there were included signs bearing the caricature of a donut man and the words Mr. Donut as such indicia appears on the Ragsdale trademark registration. (R. 579). These signs together with all the equipment and supplies used by Mr. Ragsdale to operate his donut shop, including flour, shortening, powdered sugar, flavoring, donut bags, boxes, donut making machines and advertising tabs were included in the purchase made by Mrs. Ziebell. The paper bags bore the donut man caricature and the words Mr. Donut. After this purchase Mrs. Ziebell continued to manufacture and sell donuts in the shop formerly operated by Mr. Ragsdale. Mrs. Ziebell operated the former Ragsdale shop continuously until 1959 and she continued to display the sign bearing the little donut man caricature and the words Mr. Donut in the form appearing in Registration No.

427,509. Additionally, the trademark was used in newspaper ads and on a Jeep stationwagon which was used to make deliveries. Former customers of Mr. Ragsdale continued to purchase donuts after Mrs. Ziebell acquired the Ragsdale donut shop. After the sale of his donut shop, Mr. Ragsdale did not again sell donuts (R. 579, 580). While the district court made no specific findings, defendants failed to offer any evidence that suggests the plaintiff was aware that the Ragsdale donut business was operated by and the mark MR. DONUT was being used by Mrs. Jean Ziebell rather than by Mr. Ragsdale's estate at the time plaintiff acquired the Ragsdale registration from Mr. Ragsdale's estate. Nor is there any evidence that the plaintiff knew Mrs. Ziebell operated the Ragsdale business in apparent conflict with the patent office records showing ownership of the Ragsdale registration in Ragsdale's estate.

THE DEFENDANTS' SHOPS WERE OPENED IN DISREGARD OF MANY AVAILABLE PUBLIC RECORDS OF PLAINTIFF'S CLAIMS TO MISTER DONUT AND MR. DONUT, WITH ALL THE SHOPS OPENED IN DIFFERENT TRADE AREAS AND WITH ALL BUT ONE OPENED AFTER ISSUANCE OF AT LEAST ONE INCONTESTABLE REGISTRATION TO PLAINTIFF.

By December 1957, the date of first actual use of the mark MR. DONUT by defendants, the following public records in the Patent Office, evidencing plaintiff's claims to MR. DONUT and MISTER DONUT, were readily available to anyone including the defendants (R. 394, 395): (a) the 1947 Ragsdale registration of the mark MR. DONUT (Ex. 4); (b) the assignment of the Ragsdale registration on July 17, 1956 from the estate of Mr. Ragsdale to the plaintiff, then known as Harwin Management Corp. (Ex. 5); (c) a pending application of the plaintiff for the mark MR. DONUT filed on October 24, 1955 under Serial No. 693,602 (Ex. 7); (d) a certified copy of plaintiff's change of name to Mister Donut of America, Inc. (Ex. 8); (e) an application that plaintiff filed on October 9. 1956 for registration of the mark MISTER DONUT for flour, filling and jellies for donuts, coffee and vegetable shortening, which later matured into plaintiff's registration 683,370 on January 27, 1959 and is now incontestable (Ex. 2); (f) an application for plaintiff filed on November 28, 1955 for registration of the mark MISTER DONUT for snack bar services which matured into Registration 668,784 on October 28, 1958 and is now incontestable (Ex. 3) and (g) a publication for opposition in the Official Gazette of the Patent Office of November 12, 1957, (See Publication notice in defendants' Ex. C) of plaintiff's application for registration of MISTER DONUT, Serial No. 698,978 (now Registration 668,784) (Ex. 3). By the time defendants expanded into a different trade area by opening a second donut shop plaintiff's registration 668,784 (Ex. 3) for MISTER DONUT had issued.

The defendants opened their first MR. DONUT shop in Orange County on or about December 3, 1957, more than a year after the plaintiff had recorded in the Patent Office its assignment of the Ragsdale registration for the mark MR. DONUT (R. 580) and after publication for opposition of plaintiff's registration 668,784 (Ex. 3).

The name MR. DONUT was selected by defendant David Jones without any investigation of prior registrations of others, even though Jones was thoroughly experienced in the franchise operation of Winchell Donut Shops (R. 393). And despite the lack of truthfulness of the defendants' principal witness (R.T. 391) the district court found that this defendant adopted the mark MR. DONUT without actual knowledge of the plaintiff's prior use of the mark MISTER DONUT or the use by anyone of MR. DONUT (R. 580).

This first donut shop of the defendants was the only one opened and in operation until 1959 when a second shop was opened in Santa Ana, California, with this second shop opening after issuance of the plaintiff's incontestable registration 668,784 on October 21, 1958 for the mark MISTER DONUT covering snack bar services (R. 565, 560). The defendants subsequently opened five more MR. DONUT shops. Of these, two were opened in Santa Ana, one in Placentia, one in Garden Grove and one in Orange, California. The defendants' activities were initially conducted by David K. Jones and his wife, Helen L. Jones. Subsequently, and long after this suit was commenced, the defendants' incorporated as MR. DONUT, INC. The defendants did not franchise any of their shops until May 30, 1960 at which time MR. DONUT No. 3 was franchised (R. 390). At present, MR. DONUT, INC. operates two shops and franchises the remaining five, all located in Orange County (R. 581).

The defendants' seven shops are each located at least *five* miles away from one another (R.T. 371) and cater to customers only within a radius of *four* miles (R. 581). Defendant D. K. Jones admitted that these shops catered to local trade and that the second shop opened was in a different trade area from the first (R.T. 372).

ALTHOUGH THE COURT FOUND THE DEFENDANTS' SHOPS WERE LOCATED ON LOCAL STREETS, THE PARTIES STIPULATED THEY WERE LOCATED ON MAJOR THOROUGHFARES AND, ACCORDING TO DEFENDANT, CATERING TO THROUGH TRAFFIC FEEDING TO AND FROM INTERSTATE HIGHWAYS.

The district court found that all equipment and supplies used in the shops have been and are purchased in Orange and Los Angeles Counties; that all defendants' products are sold in Orange County; that all advertising is limited to Orange County and no attempts have been made to attract customers from other areas (R. 581). Although both parties stipulated in the Pretrial Order that "all of defendants' shops are on *major thoroughfares* and a number of customers are U.S. Marines in uniform" (R. 394) and although defendant D. K. Jones testified (R.T. 392) that defendants' shops cater to through traffic that feeds to and is received from interstate highways, the district court found (R. 581) that defendants' shops are "located on local streets which are not Federal or State marked highways" and most customers are regular or repeat (See also R.T. 270). And although both parties stipulated in the Pretrial Order that "Defendant D. K. Jones admits he has seen a number of people purchasing products from defendants' shops who arrive in cars with out-of-state plates" and defendant D. K. Jones admitted that a significant part of defendants' business could be from people traveling in interstate commerce (R.T. 392) the district court found (R. 581) that only ". . . *a few customers*" drive . . . "to defendants' shops in automobiles having non-California license plates . . ." (R. 581). (Emphasis added.)

THE BUSINESS OF THE PARTIES IS SUBSTANTIALLY IDENTICAL AT BOTH A FRANCHISING AND RETAIL LEVEL.

The plaintiff and defendants both use the marks MISTER DONUT and MR. DONUT in essentially the same manner in donut shops which are primarily franchised, but in some instances are operated directly by the parties (R. 390-94, 396, 578, 581). Each uses its marks on free standing signs and numerous small signs inside and about the shops as well as on bags, boxes, napkins and other disposable items (R. 392, 394, 579). Both the plaintiff and defendants sell a limited variety of food and beverages in their donut shops consisting principally of donuts and coffee, both for consumption on the premises and for carrying out (R. 389, 578). Both parties advertise their shops in newspapers, on radio, in telephone books, and by other means (R.T. 358).

The plaintiff also solicits prospective franchises by paid national and local advertising, (Ex. 31-39), by distribution of brochures in MISTER DONUT shops (Ex. 29), by unsolicited publicity, by mail distribution (Ex. 40) and by word of mouth (R.T. 145).

DEFENDANTS AGREED THAT THERE WAS LIKELIHOOD OF CONFUSION BY THE PUBLIC IN CONTEMPORANEOUS USE OF THE MARKS MR. DONUT AND MISTER DONUT BY THE PARTIES.

Although the court found the parties were not in competition and that defendants' business does not affect interstate commerce (R. 582), it made no findings on testimony directly relating to the crucial issue as to whether there was likelihood of confusion. Substantial evidence however was offered on this point. Not only did independent witnesses, Carlos W. Parker, (R.T. 296), Geraldine Messinger (R.T. 308) and John E. Sullivan (R.T. 252-56) testify that confusion was likely, but defendant D. K. Jones admitted it (R.T. 397). Further it was stipulated by the parties that "Mister" and "Mr." are euphonically the same and the latter is an abbreviation of the former (R. 394). Moreover substantial evidence was offered that plaintiff was presently active in establishing operations in Orange County and Los Angeles County (R.T. 74 to 81, Ex. 108, 113 to 116).

SPECIFICATION OF ERRORS

1. The trial court erred in not finding that the use of Mister Donut and Mr. Donut respectively by plaintiff and defendants in operating and franchising donut shops is likely to cause confusion or mistake. [F. 6, 18, 21, 24, (R. 577, 581, 582); C. 8, 12, (R. 583)].[5]

2. The trial court erred in not finding that plaintiff's prior adoption and continuous use of Mister Donut and Mr. Donut beyond the limits of California entitles it to preclude use of Mr. Donut in California by defendant under the law of California. [F. 18, (R. 581); C. 7, 8, (R. 583)].

3. The trial court erred in not finding plaintiff's operation and franchising of donut shops in California and other states under its valid federally registered mark MISTER DONUT entitles it to preclude further intrastate use by defendants of a confusingly similar mark [C. 4, 5, (R. 582)].

4. The trial court erred in not finding the recorded assignment of MR. DONUT Ragsdale registration to plaintiff and plaintiff's pending applications for federal registration of MISTER DONUT at the time defendants first used MR. DONUT were constructive notice of plaintiff's claim to MR. DONUT under the Lanham Act. [F. 13, (R. 580); C. 2, 3, (R. 582)].

5. The trial court erred in holding defendants may open or franchise donut shops in areas other than that trade area in which they operated before issuance of plaintiff's federal registration for MISTER DONUT. [C. 4, 5, 6, 7, 8, (R. 582, 583)].

6. The trial court erred in not holding a recorded assignment from the record title holder of the trademark MR. DONUT and its federal registration 427,509 together

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[5] "F." indicates "finding of fact" and "C." indicates "conclusion of Law."

with the good will represented thereby at a time when the mark was in active use for valuable consideration conveys good title in the trademark to plaintiff in the absence of an actual transfer of physical assets. [F. 11, 12, 13, (R. 579, 580); C. 2, 3, (R. 582)].

7. The trial court erred in presumably holding that actual competition between the parties is necessary in establishing infringement of a federally registered trademark. [F. 21, (R.582); C. 7, 8, 9, 12, (R.583)].

8. The trial court erred in not holding the prima facie valid records of the Patent Office in 1956 showing an assignment of Mr. Donut Registration 427,509 to plaintiff bars a defense of good faith adoption in October 1957 of the same mark by defendants. [F. 11, 12, 13 (R. 579, 580); C. 2, 3, (R. 582)].

9. The trial court erred in not holding that plaintiff's rights in the Ragsdale trademark Mr. Donut and its registration were superior to those of Jean Ziebell because plaintiff was a bona fide purchaser for valuable consideration who recorded an assignment under 15 U.S.C. §1060. [F. 11, 12, 13, (R. 579, 580); C. 2, 3, (R. 583)].

10. The trial court erred in not holding the plaintiff, who now operates or franchises 200 Mister Donut Shops from Massachusetts to California, is entitled to an injunction against defendants' operation and franchising of seven Mr. Donut Shops in Orange County, California, where plaintiff adopted and used the mark Mister Donut in interstate commerce in 1955, took all steps possible to assert ownership of this mark, including the purchase and recording of an assignment in the United States Patent Office in 1956 of a Mr. Donut registration, the filing of three applications for federal registration in 1955 and 1957 (two of which now have matured into incontestable registrations), and the obtaining of numerous state trademark registrations, and where defendants long afterwards

adopted without investigation the confusingly similar mark Mr. Donut without any prior investigations, and are using it in a manner which actually damaged plaintiff and confuses the public. [C. 7, 8, 12, (R. 583)].

ARGUMENT

Summary of Argument

Plaintiff's federal registrations 683,370 and 668,784 (Ex. 2, 3) for Mister Donut are infringed by defendants' use in the same business of Mr. Donut since confusion has actually occurred and is likely. Defendants' claim of innocent adoption of Mr. Donut before issuance of these registrations is no defense because defendants are charged with constructive knowledge of plaintiff's claim of ownership of Mister Donut and Mr. Donut by virtue of (1) plaintiff's acquisition and recording in the Patent Office of federal registration 427,509 (Ragsdale registration) more than a year before defendants went into business (see 15 U.S.C. §1072), (2) publication in the Official Gazette of the Patent Office of the application for registration 668,784 at least several weeks before plaintiff started to use Mr. Donut and (3) California State law which precludes innocent adoption as a defense in the interest of protecting the public from confusion. Assertions that plaintiff cannot rely upon the Ragsdale registration because the assignment was "in gross" and conveyed no goodwill are wrong. At the time of the assignment of the Ragsdale registration to plaintiff, the Ragsdale Mr. Donut operation, unknown to plaintiff, had already been sold by mesne assignment to Jean Ziebell who was then operating under the Mr. Donut mark. And plaintiff as an innocent bona fide purchaser for value of all rights, title and interest in the mark and registration was entitled to rely upon the Patent Office records in determining record title holder. (15 U.S.C. §1060). That plaintiff did not take recipes, merchandise, customer lists, etc., in acquiring the goodwill is irrelevant since goodwill is an intangible.

Defendants' claims that they are not amenable under the Lanham Act because they do not operate in or affect interstate commerce is plainly wrong since defendants have affected plaintiff's interstate business by directly causing three prospective franchisees to refuse plaintiff's franchises and are likely to cause more damage in view of plaintiff's present activities in Orange and Los Angeles Counties. Actual competition is not necessary.

Plaintiff's Ragsdale registration, the validity of which was not attacked, is infringed for reasons set forth above.

Defenses to charges of infringement of plaintiff's Lanham Act registrations are applicable only in the trade area in which defendants operated before plaintiff's registrations 683,370 and 668,784 issued. 15 U.S.C. §1115(b). Therefore defendants' use of Mr. Donut, if permitted at all, should in any case be confined to the admitted trade area of a four mile radius from the only shop of defendants that was opened before plaintiff's registrations issued.

Under California common and statutory law the first user of a trademark inside or outside of the State is the owner. Cal. Bus. and Prof. Code, § 14270. Since liability is determined solely on the basis of confusion with a valid mark, plaintiff as first user and therefore owner is entitled to relief.

The incontestable status of plaintiff's Lanham Act registrations should afford plaintiff the right to use them in California without any restrictions, even if incontestability is deemed purely defensive in nature.

Actual Confusion Has Occurred and Likelihood of Confusion Obviously Exists Between Plaintiff's Earlier Use of "Mister Donut" and Defendants' Subsequent Use of "Mr. Donut."

The district court seems to be under the clearly erroneous impression that infringement is measured by the existence of competition, rather than confusion or likelihood of confusion between the marks in question. This is evident because the district court made no finding relating to confusion or likelihood of confusion of the marks, even though plaintiff had urged it to do so (R. 542). Rather, the Court merely concluded the parties were not engaged in competition (R. 582). Consequently, it must be assumed the district court completely misunderstood the basic test of infringement applicable in this case.

The Lanham Act, 32(1), 15 U.S.C. §1114(1), provides that

> "Any person who shall . . . use in commerce any . . . colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive; or . . . imitate a registered mark and apply such reproduction . . . to . . . signs . . . intended to be used in commerce on or in connection with the sale . . . of goods or services on or in connection with which such use is likely to cause confusion or to cause mistake, or to deceive; shall be liable in a civil action . . . for the remedies hereinafter provided."

"Colorable imitation" is defined under the Lanham Act, §45, 15 U.S.C. §1127, as including any mark which so resembles a registered trademark as to be likely to cause confusion or mistake or to deceive. This statutory requirement, clearly supported by innumerable cases, defines a simple and clear measure of infringement which apparently was ignored by the district court.[6] *The Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963); *Paul Sachs Originals Co.* v. *Sachs*, 325 F.2d 212 (9th Cir. 1963). Competition is not even required in cases of unfair competition. *Phillips* v. *The Governor & Co.*, 79 F.2d 971 (9th Cir. 1935).

The record is replete with evidence that not only is confusion likely between plaintiff's Mister Donut mark and defendants' Mr. Donut mark, but that confusion has actually occurred. Geraldine Messinger testified that she was interested in obtaining a Mister Donut franchise from plaintiff in California, but did not when she discovered defendants' inferior Mr. Donut operation. When asked whether there might be some connection between the two she indicated that she "had no idea whether there was or was not a connection" and that she "had no way of knowing" (R.T. 308, 309). Likelihood of confusion was also evidenced by the testimony of John E. Sullivan and Carlos W. Parker, both of whom testified that they were interested, prospective franchisees who discontinued their interest because of the strong likelihood of confusion between the marks in question. (R.T. 252-256, 296). This testimony establishes confusion on the franchising level in which both parties are involved. Confusion on the less

[6] The district court apparently applied a measure of liability that was used in the infancy of the law of unfair competition and which was aimed at preventing a fraud where one party sought to pass off or palm off his goods as those of another. There the question of intent played an extremely important role but today the law has passed far beyond this limited concept of "palming-off" in determining what are or what are not unfair practices in business dealings. *See* Vandenburgh, Trademark Law and Procedure, page 102 (1959).

sophisticated retail sales level is even more likely. The defendant David K. Jones admitted that likelihood of confusion was obvious and probable, particularly in view of the imminent expansion of the plaintiff into Orange County. The following colloquy took place during the deposition of the defendant David Keith Jones on April 22, 1965:

> Q. 'You said there would be no confusion under those conditions?'
>
> A. 'There would be confusion.'
>
> Q. 'In other words, they are substantially the same in print?'
>
> A. 'Yes.'
>
> Q. 'That is why you object to the establishment of MISTER DONUT, plaintiff's operation, in Orange County; is that correct?'
>
> A. 'Yes.'
>
> Q. 'In other words, do you believe that if someone drove down one street and saw your shop, and then on a street close by and saw a MISTER DONUT shop, plaintiff's, they might associate the two and consider them as being the same operation?'
>
> A. 'Possibly.'

In addition, the stipulated facts in the Pre-Trial Conference Order fully support the probability of confusion. Stipulated Fact (Q) reads: " 'MR. ' is an abbreviation of 'MISTER'. Euphonically there is no difference between 'MR.' and 'MISTER,' and the two terms are identical in meaning." (R. 394) The substantial identity of the marks in issue and the absolute identity of the operations of the parties in operating and franchising donut shops, the manner of use of the marks on signs, boxes, bags, etc., as well as the substantial similarities in advertising techniques leaves no doubt that there is obvious likelihood of confusion among the purchasing public.

Defendants Have Infringed Plaintiff's Valid Federal Registrations 683,370 and 668,784 For the Mark "Mister Donut" By Adopting and Using "Mr. Donut" With Constructive Knowledge of Plaintiff's Earlier Use of "Mister Donut" In the Same Business.

The plaintiff's mark Mister Donut was registered under The Lanham Act for snack bar services under Registration No. 668,784 (Ex. 3) on Oct. 21, 1958, and for flour, filling and jellies for doughnuts, coffee and vegetable shortening in Registration 683,370 (Ex. 2) on August 11, 1959. These registrations are, prima facie evidence of the plaintiff's "exclusive right to use the registered mark in commerce on the goods or services specified in the registration . . .". (Lanham Act, § 33(a), 15 U.S.C. 1115a) subject to legal or equitable defenses which defendants assert. The validity of these registrations was sustained by the district court (R. 583). Since as noted in the preceding section of this brief there is actual confusion and likelihood of confusion between the defendants' Mr. Donut and plaintiff's registered Mister Donut, defendants' activities obviously constitute infringement under 15 U.S.C. §1114(1) which is actionable by the plaintiff in the absence of an affirmative defense.

Since Defendants Had Constructive Knowledge of Plaintiff's Mark Mister Donut and Have Actually Damaged Plaintiff's Interstate Business, Their Asserted Defenses Are Not Sustainable.

Essentially, the district court agreed with two defenses raised by the defendants. First, the district court concluded that defendant's adoption of Mr. Donut was without actual knowledge of plaintiff's prior use at a time just before plaintiff's registrations Nos. 683,370 and 668,784 issued, and therefore came within the exception of the Lanham Act § 33(b) 5; 15 U.S.C. 1115(b)5. Secondly, the district court concluded that defendants' use of Mr. Donut does not come within the proscriptions of the Lanham Act because the mark is not used "in commerce" within the meaning of 15 U.S.C. 1114(1). The district court rejected the other defenses raised, including the defense of fraud in acquiring the registrations. We shall discuss in the next sections of this brief the reasons why the district court was in error in sustaining these two affirmative defenses.

Defendant's Adopted "Mr. Donut" As A Trademark With Constructive Knowledge of Plaintiff's Prior Registrations Nos. 683,370 and 668,784, Because At the Time of Such Adoption the Assignment To Plaintiff of the Mr. Donut Registration, and the Publication of An Application For Registration of Mister Donut Were of Public Record In the Patent Office.

The defense that defendants' adopted Mr. Donut without knowledge of plaintiff's prior use of Mister Donut is one of the specifically defined defenses permitted under the Lanham Act § 33(b); 15 U.S.C. 1115(b).

Insofar as pertinent this section as amended reads:

> If the right to use the registered mark has become incontestable under Section 15 hereof, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provision of said section 15 subject to any conditions or limitations stated

> therein except when one of the following defenses of defects is established: . . . (5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to registration of the mark under this Act or publication of the registered mark under subsection (c) of section 12 of this Act: *Provided, however,* That this defense or defect shall apply only for the area in which such continuous prior use is proved; . . ."

Section 33(b) of the statute has been judicially construed to preclude defendant's good faith or ignorance of plaintiff's prior adoption and registration as a defense. *Dawn Donut Co., Inc. v. Hart's Food Stores, Inc.*, 267 F. 2d 358, 362, (2nd Cir. 1959); *American Foods, Inc. v. Golden Flake, Inc.*, 312 F. 2d 619, 626, (5th Cir. 1963); *Hot Shoppes, Inc. v. Hot Shoppe, Inc.*, 203 F. Supp. 777, 780 (M.D. N.C. 1962); *Nielsen v. American Oil Co.*, 203 F. Supp. 473, 477 (D. Utah 1962); *Quality Courts United v. Quality Courts*, 140 F. Supp. 341, (M.D. Pa. 1956).

Plaintiff claimed defendants could not assert a defense of innocent adoption because it had both actual knowledge and constructive knowledge of plaintiff's earlier use. Plaintiff's claim of constructive knowledge is based upon (1) its recorded ownership of the Ragsdale registration at the time defendants first used Mr. Donut, (2) the prior publication of the application which matured into registration 668, 784 (Ex. 2) and (3) California Law.

Accepting the Court's conclusion that the defendants did not have mere *actual* knowledge of the plaintiff's prior use of the mark Mister Donut and Mr. Donut, the defendants have nonetheless failed to sustain the burden cast upon them to prove that they did not have knowledge within the meaning of 15 U.S.C. 1115b, of the plaintiff's prior use of MISTER DONUT at the time it first adopted MR. DONUT as a trademark. The plaintiff is still entitled to judgment because the defendants had *constructive knowledge* of the plaintiff's trademarks MISTER DONUT and MR. DONUT, and since the defendants' burden under 15 U.S.C. 1115(b) is to prove that they lacked knowledge of any kind, whether actual or constructive, their constructive knowledge of the plaintiff's trademark registrations precludes them from establishing a defense under this section.

The defendants had constructive knowledge of the plaintiff's prior use of the mark MR. DONUT because at the time they first used the mark MR. DONUT in December 1957, publicly available records in the patent office showed that the plaintiff claimed ownership of the trademarks MR. DONUT and MISTER DONUT. Of the many Patent Office records that were publically available the most pertinent were the Ragsdale Registration No. 427,509 (Ex. 4) for the mark MR. DONUT which was registered under the Act of 1905 and the recorded assignment of that registration to plaintiff (Ex. 5). The plaintiff acquired the Ragsdale registration from the estate of Finis L. Ragsdale for $100.00 by an assignment dated July 17, 1956 which assignment was recorded in the United States Patent Office on July 23, 1956, more than a year before the defendants' first use of MR. DONUT (R. 580). This registration was constructive notice to the defendants of the plaintiff's prior use and claim to the mark MR. DONUT because the Lanham Act, § 22, 15 U.S.C. 1072, expressly provides that a registration on the Principal Register or under the Act of 1905 shall constitute *constructive notice* of registrant's claim of ownership of the mark. That section states:

> Registration of a mark on the principal register provided by this Act or under the Act of March 3, 1881,

> or the Act of February 20, 1905, shall be constructive notice of the registrant's claim of ownership thereof.

This section of the Lanham Act was considered at the time of the enactment of the Lanham Act, as one of the significant advantages of the Lanham Act over earlier acts. As stated in *Commentary on The Lanham Trademark Act* by Daphne Robert, following 15 U.S.C.A. § 1024, page 265, 280 it was stated:

> The greatest single advantage of a principal registration is that it is constructive notice of the registrant's claim of ownership of the mark. This means simply that so long as a mark remains on the Principal Register, everyone is charged with notice of the claim of ownership, and no rights may be claimed in the mark by another who commenced to use it after the registration issued. In fact, no rights may be claimed if the use commenced after the mark was published in the Official Gazette for opposition purposes. It means that such use is an unlawful use and cannot be justified by a claim of innocence, good faith or lack of knowledge. It's practical effect is to give nationwide effect to a principal registration, providing notice to the intrastate users as well as others, and thereby eliminating one of the weaknesses inherent in prior statutes.

The practical importance of this notice provision in giving nationwide effect to the Lanham Act and in foreclosing defenses of innocent adoption of infringing marks which might arise many years later when it would be difficult for a plaintiff to disprove claims of innocense by a latecomer was soon recognized in *Sterling Brewers, Inc.* v. *Cold Spring Brewing Corp.*, Case 1, 100 F. Supp. 412 (D. Mass.

1951). The court after quoting from the Commentary of the Act, by Daphne Robert, *supra*, went on to state:

> The same author in the 'New Trademark Manual' 1947, sums up the situation as follows: '. . .This answers the question so often asked "What does my registration give me?". Up to now, there was good reason for asking the question, and lawyers and judges were frequently hard put to find a satisfactory answer. . . It's practical effect is to give nationwide coverage to a Federal registration. . . (I)t provides a sense of security to the registrant by preserving for him the right to expand his market at a later date without fear of having it usurped by a newcomer. The prior laws did not enlarge the commonlaw, but the commonlaw to this extent is now supplanted by the statute.'

This important feature of providing a registrant with a "sense of security" is subverted if the plaintiff in this case cannot rely upon a recorded assignment of a registration for notice at least during the period of time that the assignment and registration remain prima facie valid instruments.

However, the district court erroneously decided that as a matter of law plaintiff could not rely upon the Ragsdale registration to give defendants constructive notice of the plaintiff's claim of ownership. Although the court acknowleged the assignment document recited a transfer of goodwill and that it was recorded in the United States Patent Office on July 23, 1956 (R. 580), it concluded that this assignment document did not constitute a valid assignment because it was in gross and did not involve transfer of customer lists, merchandise, equipment, recipes or goods from the assignor. (R. 582). The district court's conclusion of law that the assignment of the Ragsdale Registration was invalid is not only erroneous, but also it begs the real question.[7] The real question is not whether the Ragsdale assignment is valid, but rather, whether the recording of that assignment under the Lanham Act, § 10, 15 U.S.C. 1060 placed defendants on notice that plaintiff claimed ownership under 15 U.S.C. 1072.

The Ragsdale assignment (Ex. 5) was duly recorded in the Patent Office on July 23, 1956 under the provisions of the Lanham Act § 10, 15 U.S.C. 1060, which in part provides:

> Assignments shall be by instruments in writing duly executed. Acknowledgment shall be prima facie evidence of the execution of an assignment and when recorded in the Patent Office the record shall be prima facie evidence of execution.

The recorded Ragsdale assignment was therefore prima facie evidence of plaintiff's ownership of the registration from its recording in 1956. By virtue of the recorded assignment, anyone checking the Ragsdale Registration would find ONLY the plaintiff as owner. And as assignee, plaintiff was entitled to the benefits of the Lanham Act, § 22, 15 U.S.C. 1072. Thus taken together, the Lanham Act, § 10 and § 22, provide simply that one purporting to be an assignee can give the world constructive notice that he claims an interest in a particular registration. The district court's opinion however, would require that the assignment be valid and that assignee be prepared many years later to withstand any attacks on the validity of the aquisition if the assignee wishes to enjoy the benefit of the notice provisions.

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[7] We will point out in a subsequent section dealing with defendants' infringement of the Ragsdale Registration why the district court is erroneous in holding the assignment invalid.

The present case points up the difficulties presented to a trademark owner who wants to maximize his protection. Had the plaintiff been aware that the equitable owner of the Ragsdale Registration was Jean Ziebell it would have sought to obtain the assignment from her and perhaps also the estate. But if it had, just how much equipment or merchandise would have to have been taken, and how extensive a use of recipes and customer lists would have to have been made to preclude a subsequent challenge? And to what extent would plaintiff have to prove this use to rebut evidence if Ziebell with or without approval continued to use the mark? And in this connection keep in mind no evidence was ever offered by defendants that plaintiff did not, receive merchandise, customer lists or recipes from the estate, and yet the district court concluded from the circumstantial evidence of Ziebell's continued use that plaintiff's acquisition must have been in gross.

A comparison of 15 U.S.C. 1072 and 1115(a) suggests that the purpose of the constructive notice function of a registration is subverted if it is subjected to collateral attack. 15 U.S.C. 1115(a) which defines the effect of an "incontestable" registration also permits a defendant to prove ". . .*any legal or equitable defense or defect. . .*" to such registrations. But unlike 15 U.S.C. 1115(a), no provision is made in the Lanham Act for contesting the constructive notice provisions of 15 U.S.C. 1072. It logically follows that it was the purpose of the Act to permit a defendant to establish certain defenses challenging an "incontestable" registration, but it was not the purpose of the Act to permit a defendant to challenge the effectiveness of the constructive notice provision of the Act.

Perhaps a registration should not serve as constructive notice of a claim of ownership under 15 U.S.C. 1072 where there is an adjudication or record in the Patent Office that rebuts the prima facie claim of exclusive right under 15

U.S.C. 1115(a), or where an innocent defendant acted in reliance upon such a record. But this is and was not the case in the present civil action. At the time defendants adopted their mark Mr. Donut the only Patent Office records then available to defendants clearly showed the plaintiff had exerted every possible claim of ownership to the marks Mr. Donut and Mister Donut, not only through the acquisition of the Ragsdale Registration 427,509 but also through several pending applications that later matured into registrations under which the plaintiff now seeks relief. There was in fact no evidence then of record which rebutted plaintiff's prima facie right. And had the defendants sought evidence as to the identity of the true owner of the Ragsdale registration 427,509 they could not have avoided actual knowledge of the plaintiff's claim. But the defendants did not seek such evidence, and in fact never relied upon the allegation of a defective transfer which they now claim to be so important to their rights. To emasculate the notice function of the Ragsdale registration 427,509 at a time when it was prima facie the property of plaintiff merely because ten years after the assignment was recorded a court found that there was no transfer of customer lists., etc., would effectively reward the defendants' lack of diligence in searching the record. Such a result clearly thwarts an intended effect of the Lanham Act which is to make "actionable the deceptive and misleading use of marks . . .". Lanham Act, § 45; 15 U.S.C. 1127.

While we believe that the Ragsdale registration, whether or not properly assigned, serves as constructive notice of plaintiff's claim of ownership there are other reasons for holding that defendants had constructive knowledge of plaintiff's claim. Constructive knowledge of any other Mister Donut registration or record at the time defendants adopted Mr. Donut would preclude the asserted defense of innocence of 15 U.S.C. 1115(b).

At the time defendants started to use Mr. Donut the Patent Office had already published Registration 668,784 (Ex. 2) (then Serial number 698,978) in the Official Gazette of the Patent Office on November 12, 1957 pursuant to the Lanham Act § 12(a), 15 U.S.C. 1062(a). (See Notice of Publication in Ex. C). This publication of the Official Gazette was easily available to defendants under the rules of the Patent Office (see Trademark Rules of Practice § 1.12 (1956 Ed.) and under 15 U.S.C. 1057(e). Furthermore, it would have been found by defendants attorneys had defendants asked the attorneys to check the availability of the mark Mr. Donut. The attorneys would have made a conventional trademark search, either directly in the Patent Office records or through a trademark search service. In either case plaintiff's application would have come to defendants attention.[8] The effectiveness of a publication under the Lanham Act § 12(a) to give constructive notice of a claim of trademark ownership is not dealt with specifically in the Act. However it is logical to interpret a publication of a mark under section 12(a) as constructive notice of a claim of ownership.

As previously noted plaintiff's Mister Donut registration 668,784 (Ex. 2) was published under Lanham Act, § 12(a) on November 12, 1957 before defendants' first use of Mr. Donut on December 3, 1957. Under Lanham Act, § 33(b)5, defendants' defense of innocense is valid only if (1) their *use* was without *knowledge* of the registrant's prior use and (2) their *use* was continuous from a date *prior* to *registration*. Thus, the requirement that defendants have no knowledge is not tied to the date of plain-

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[8] Private trademark search services ordinarily file publications in the official gazette for the express purpose of citing them when searching the records. Further, it is common practice for trademark counsel to review the weekly Official Gazette for purposes of drawing the attention of their clients to relevant publications. See Vandenburgh, Trademark Law & Procedure, pp. 166-7 (1959).

tiff's registrations. Rather it is defendants' *use* that is tied to plaintiff's registrations. Thus this portion of the statute broadly requires that the defendants be totally free of knowledge regardless of the date of registration. Consequently the finding of the district court (F. 18, R. 581) that defendants' use prior to registration is a defense under 1115(b)5 is in error because it failed to consider whether the earlier publication of plaintiff's MISTER DONUT mark for opposition imposed constructive notice on defendants. Under Lanham Act, § 15, 15 U.S.C. 1065, an incontestable status for a registration can only be obtained if the registration was "*published*" before the valid use of a mark in any state by another. Since the right to obtain an incontestable mark under section 15 is keyed to the publication date it is logical to consider this same publication date as an effective date for impugning constructive notice to a careless latecomer.

Nothing in Lanham Act, § 22, 15 U.S.C. 1072, requires that constructive notice be limited to the dates of registration. And indeed there is authority which fully supports plaintiff's contention that the publication on November 12, 1957 of plaintiff's MISTER DONUT registration should serve as constructive notice of a claim of ownership. In the *Commentary on The Lanham Trademark Act, supra* Daphne Robert stated in respect to a second user:

"In fact, no rights may be claimed if the use commenced after the mark was published in the Official Gazette for opposition purposes."

A similar view has also been advanced in Vandenburgh, TRADEMARK LAW AND PROCEDURE, pp. 55, 56 (1959) where the author charts the extension of rights under a federal registration, and states an incontestable registration, such as plaintiff's registration (Ex. 2,) may preclude a second user whose use starts after publication for opposition, citing sections 22 and 33(b) of the Act. These views of trademark commentators have found support in case law. In *Aluminum Fabricating Co. v. Season-All Window Corp.*, 160 F. Supp. 41, 46 (S.D.N.Y. 1957) (dictum), the court stated:

> Both prior to and under the Lanham Act the party seeking to limit the registered owner's rights must have adopted the mark prior to the publication of the registered mark and without knowledge of the registrant's prior use.

Since "constructive notice" is a substantive issue which is not wholly defined in the Lanham Act we may look to California law for guidance, provided such law is not inconsistent with the intent of the Lanham Act to ". . .protect registered marks . . .from interference by State. . . legislation." Under Cal. Bus. & Prof. Code § 14,270 the original owner was the first to use whether the use was within or beyond the limits of the state. This statute has been construed to preclude subsequent infringing use regardless of whether the latecomer had actual knowledge or had fraudulent intent. See *Stork Restaurant v. Sahati*, 166 F. 2d, 348 (9th Cir. 1948); *Western Stove Co. v. George D. Roper*, 82 F. Supp. 206 (D.C. Cal. 1949). Surely if under California law actual knowledge is unnecessary to afford relief to the owner of a trademark and the owner is the first to use, official publications intended to give notice and publicly available records of plaintiff's first use and acquisition of Mr. Donut should function as constructive notice to defendants of plaintiff's prior claim.

Any Intrastate Activities Of The Defendants Which Affect The Plaintiff's Federally Registered Trademarks Are Proscribed By The Lanham Act. Defendants' Intrastate Use Of A Mark Confusingly Similar To Plaintiff's Registered Mark Is Substantially Affecting Interstate Commerce Since (1) Plaintiff Is Actively Engaged In The Business Of Seeking Franchises In Orange County California, (2) At Least Three Prospective Franchisees Have Discontinued Dealing With The Plaintiff Because Of The Defendants' Intrastate Activities, And (3) Plaintiff Is Already Operating At Least Five Mister Donut Shops In California.

It is now well settled that the Lanham Act proscribes infringements committed in purely intrastate commerce if such infringements affect interstate commerce. This principle was recognized in this circuit in *Stauffer* v. *Exley*, 184 F. 2d 962 (9th Cir. 1950).

In the present civil action the defendants admit that their mark is confusingly similar to plaintiff's registered trademark, but argue that their activities are purely local and are not such as to affect interstate commerce. As there is no substantial dispute as to the facts, the issue to be resolved is whether the district court was correct in holding defendants' intrastate use of a mark confusingly similar to plaintiff's, as a matter of law, affects commerce within the meaning of the Lanham Act. In the *Stauffer* case, this Court stated the guidelines to be followed in measuring the jurisdictional extensions of the Lanham Act:

> Under the present Act, however, it need only be proved that the infringer has used the copy or imitation in commerce which Congress has power to regulate. An infringement committed in intrastate commerce but affecting interstate commerce could clearly

be regulated by Congress and thus would be within the present Act.

This court has therefore decided that jurisdiction exists if the defendants' activities affect interstate commerce *without* reference as to whether or not the effect is substantial. Such broad interpretation of the Lanham Act has been widely accepted. *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952). *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Cal. 1956). See also Robert, *Commentary on Lanham Trade-Mark Act*, following 15 U.S.C.A. 1024, pp. 268, 269. But see, *Pure Foods, Inc.* v. *Minute Maid Corp.*, 214 F. 2d 792 (5th Cir. 1954), *cert. denied* 348 U.S. 888 (1954).

The plaintiff already has been directly affected by the defendants' infringing use of the mark Mr. Donut because prospective California franchisees Parker, Messinger and Sullivan have refused to purchase franchises from the Massachusetts plaintiff until this matter is resolved. It is hard to imagine how much more plaintiff's interstate business can be affected than to have prospective franchisees refuse to buy franchises because of the defendant. But the district court totally ignored this most direct evidence of damage to the plaintiffs registrant's interstate business and did not even make a finding relative to it, although specifically requested in proposed findings offered by the plaintiff (R. 568). Moreover, the plaintiff's growing business of promoting franchises in California in direct competition with the defendants' business was also completely ignored by the district court. And while plaintiff presently operates five shops in the San Francisco area, there is uncontradicted testimony that it has been unable to do so in Los Angeles and in Orange County because of defendants. Under these circumstances it is plainly obvious that defendants' local acts will whittle away plaintiff's interstate business. *Stauffer* v. *Exley, supra.*

Decisions in other circuits are in accord with the guidelines of *Stauffer* and indicate jurisdiction exists in cases less compelling than the instant one. In *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, the Second Circuit expressly held that when the registrant prior user could properly show its intent to enter doughnut retailing in New York in competition with the later user, the later user would be enjoined from using the infringing mark. The operation of a single motel under a mark similar to the plaintiff who franchises its name to a large number of motel operators in various states was held to affect commerce in *Lyon* v. *Quality Courts United*, 249 F.2d 790 (6th Cir. 1957). In the *Lyon* case the court found for the plaintiff on a motion for summary judgment even though there was no finding that plaintiff actually lost business as in the instant case. In *Iowa Farmers Union* v. *Farmers' Educational & Coop. Union*, 247 F.2d 809 (8th Cir. 1957) the court held defendant's operation of a single local union competed for membership with plaintiff's interstate organization, even though there was no clear finding that plaintiff operated unions in proximity to defendant's union or that plaintiff actually lost business. Consequently defendant's action was held to violate plaintiff's federally registered trademark. In *Pure Food* v. *Minute Maid Corp.*, defendant's local sales of meat products to retailers under a mark confusingly similar to plaintiff's was considered an infringement of plaintiff's registered trademark, where plaintiff was engaged in interstate commerce. Again, there was no finding here of direct loss of business. In *Steele* v. *Bulova Watch Co.*, the defendant, a resident of Texas, was amenable to the proscriptions of the Lanham Act even though all manufacture and sale of watches under the infringing mark "Bulova" took place in Mexico. In affirming that decision, the Supreme Court recognized the broad applications of the Lanham Act to activities in which defendant purchased component parts of watches in the United States, and in which spurious watches filtered into the United States. The Court also acknowledged the *possibility* that defendant's activities could reflect upon plaintiff. There was no finding, however, that plaintiff had actually lost business. In *National Tuberculosis Ass'n* v. *Summit Co. T. & H Ass'n*, 122 F. Supp. 654 (N.D. Ohio 1954) the defendant's use of plaintiff's monogram in a single county for charitable purposes was held to interfere with plaintiff's use of the mark in interstate commerce. In *Admiral Corp.* v. *Penco, Inc.*, 106 F. Supp. 1015 (W.D. N.Y. 1952) defendant's intrastate use of plaintiff's federally registered trademark was held to come within the jurisdiction of the Lanham Act. In *Time Inc.* v. *Life Television Corp.*, 123 F. Supp. 470 (D. Minn. 1954) defendant's operation of a single retail store selling T. V. sets was deemed to make defendant amenable under the Lanham Act for infringing plaintiff's trademark LIFE which was used on its national magazine and in connection with a television station which it partially owned.

In *Cole of California* v. *Collette of California*, 79 U.S.P.Q. 267 (D. Mass. 1948) defendant's local sales were held to infringe plaintiff's registered trademark, the court stating, ". . . it is immaterial that defendant is engaged only in local sales in view of the fact that those local sales adversely affect plaintiff's interstate sales, *Id.* at 268. In *Bavarian Brewing Co. Inc.* v. *Anheuser-Busch, Inc.*, 150 F. Supp. 210 (S.D. Ohio 1957) defendant was enjoined even though it was not operating in plaintiff's area but had merely expressed an intent to so expand its operations.

The defendants urge that the effect of defendants' activities on interstate commerce must be "substantial." But this is contrary to the *Stauffer* case as well as the thrust of the *Steele* case and is obviously inconsistent with congressional intent.[9] Furthermore, decisions under other statutes clearly indicate that where Congress intends to control commerce which it may lawfully regulate, all intrastate commerce which affects interstate commerce may be controlled. *Local 167, IBT et al.* v. *United States*, 291 U.S. 293 (1933) [Sherman Act violated by intrastate monopolization of poultry sales and use of poultry coops]; *Santa Cruz Fruit Pack Co.* v. *NLRB*, 303 U.S. 453 (1937) [National Labor Relations Act violated by company purely in intrastate business interfering with employees joining or forming a union]; *United States* v. *Darby*, 312 U.S. 100 (1941) [Fair Labor Standards Act violated by intrastate employment of workers at other than minimum wages to make goods that may be shipped in interstate commerce].

The concept that commerce must be substantially affected appears to stem from cases decided before the enactment of the Lanham Act with its broad jurisdictional sweep. See, *Pure Oil* v. *Puritan Oil Co.*, 127 F.2d 6 (2nd Cir. 1942). But even these cases indicate that all that is required is a casual relation between defendant's intrastate activity and plaintiff's interstate business to bring it within the ambit of Congressional regulation. In the *Pure Oil* case, defendant's operation of a single gas station selling 95 per cent of its products to local customers was deemed "not plainly unsubstantial" in a well-reasoned opinion by Learned Hand, in which he stated: ". . . the amount does not matter if *pro tanto* the business violates the Act." Indeed, earlier cases even recognized the right of plaintiff-registrant to stop a defendant before it had even used its name in intra-

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[9] The legislative history includes the following: "There can be no doubt under the recent decisions of the Supreme Court of the constitutionality of a national act giving substantive as distinguished from mere procedural rights in trademarks in commerce . . . and . . . a sound public policy requires that trademarks should receive nationally the greatest protection that can be given them. (S. Rep. No. 1333, U. S. Code Congressional Service, 79th Cong. 2nd Sess. 1946, p. 1277)

state commerce. Mere organization under corporate law of a company having a name confusingly similar to plaintiff's was actionable. *Standard Oil Company of New Mexico, Inc. v. Standard Oil Company of Cal.*, 56 F.2d 973 (10th Cir. 1932).

The District Court erroneously relied upon *Fairway Foods, Inc. v. Fairway Markets, Inc.*, 227 F.2d 193 (9th Cir. 1955) in concluding that the defendant's activities did not come within the prohibitions of the Lanham Act. That case and cases similar to it, such as *Peter Pan Restaurants, Inc. v. Peter Pan Diner, Inc.*, 113 U.S.P.Q. 481 (D.R.I. 1957), are plainly distinguishable on their facts. In those cases it was considered conclusive that no evidence was presented that defendant's sales were other than exclusively to local residents. Here there is evidence that a substantial number of occupants of cars having out-of-state licenses entered defendants' Mr. Donut shops. In those cases, moreover, there was no evidence that defendants' intrastate sales had even a remote or indirect effect upon interstate commerce, let alone the activities of the trademark registrant. On the other hand, in the present case, defendants' intrastate sales under Mr. Donut have directly affected plaintiff's intrastate franchising. John E. Sullivan, a Californian in open court, and Carlos W. Parker, a resident of Iowa and his daughter, a resident of California, have testified that they are not interested in obtaining a California franchise from the plaintiff because of the defendants' activities. Regardless of whether the defendants' sales are wholly local it is perfectly obvious that those sales have precluded the plaintiff from selling franchises in California. How much more effect defendants intrastate activities must have on the plaintiff before the Lanham Act applies is hard to imagine. But where franchises sell for approximately $25,000.00 and three people have already indicated that they don't want to purchase plaintiff's franchises because of the defendants' activities it is perfectly apparent that the amounts involved far exceed even the minimal jurisdictional amounts of $10,000.00 required in ordinary diversity cases.

Congress intended to maximize the effect of the Lanham Act through the commerce clause of the Constitution. "Commerce" is defined in the Lanham Act, § 45 (15 U.S.C. 1127) as: ". . . all commerce which may lawfully be regulated by Congress." And in the same section the "Intent of the Act" was defined in part as:

> "The intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; . . ."

Since these definitions make it abundantly clear that Congress intended to exercise all its rights under the commerce clause, the decisions of the Supreme Court in recent civil rights cases which define the extent of this power are quite relevant, notwithstanding the opinion of the district court that they are not applicable, ". . . because the court was dealing with a specific statutory provision . . ." (R.583). If Congress intended to exercise its full powers in the Lanham Act it should follow that if the Supreme Court concludes that Congress has the power in an unrelated statute to regulate commerce of the type in which the defendants are engaged, that such activities also come within the prohibitions of the Lanham Act. In these cases, *Katzenbach* v.

McClung, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Supreme Court concluded that Congress did have the power to regulate commerce of the type in which the defendants were engaged. Consequently, if Congress has the power to require an Alabama restaurant owner who sells only to Whites to also serve Alabama Negroes inside his restaurant, surely Congress has the power to authorize this court to require a California snack bar owner not to use the trademark MR. DONUT in connection with the operation of his shops where the mark is demonstrably confusing and has caused damage to the owner of the Federally registered trademark MISTER DONUT. Whatever vitality remains in cases such as the *Fairway Foods* case and the *Peter Pan* case after these recent civil rights decisions of the Supreme Court need not be considered because those cases, as indicated above, are clearly distinguishable on their facts. In the present case defendants' operations are directly in interstate commerce because approximately 5% of the cars that stop at the defendants' shops bear out-of-state license plates. And while the district court didn't make a specific finding to that effect, it did concede that there were at least a few customers driving to defendants' shops in automobiles bearing non-California license plates who were regular customers (R.581).

Defendants also stipulated that a number of customers were Marines in uniform (R. 395). Since the activities of uniformed Marines, including their commercial activities, are obviously regulable by Congress, the defendants' sales to those Marines come within the definition of commerce under the Lanham Act.

Since the Ragsdale Registration Was Assigned By a Document Reciting Transfer of Goodwill from the Record Title Holder to the Plaintiff As a Bona Fide Purchase for Value While This Mark Was Actually in Use and Generating Goodwill, the Plaintiff Acquired Valid Title to the Ragsdale Registration.

The district court held that defendant did not infringe the plaintiff's Ragsdale registration 427,509 because the assignment of the registration was ". . . in gross and conveyed no title or trademark rights to plaintiff" (R. 580, 582). This erroneous conclusion of law is based on a misunderstanding by the district court of the relevant law. The district court believed, because there was no transfer of a customer list, merchandise, equipment, recipes or goods from the assignor when the Ragsdale registration was assigned to the plaintiff that there was no goodwill assigned even though the assignment document recited transfer of goodwill. (Ex. 5) But the district court overlooked the fact that since the mark was in use at the time of the assignment (R. 579) that it was generating goodwill; that the record title holder at the time of the assignment was the estate of Finis Ragsdale; that at the time of the assignment the plaintiff was an innocent purchaser for value; and, that at the time of the assignment no previous assignments to Mrs. Ziebell had been recorded and therefore any interest in Mr. Donut which she may have acquired was void as against the plaintiff as a subsequent purchaser for value consideration without notice under § 10, Lanham Act, 15 U.S.C. 1060.

The district court made extensive findings (R.579) that Ragsdale's Mr. Donut operation was transferred from Mr. Ragsdale in 1951 to Mr. Cohen and from Mr. Cohen to Mrs. Jean Ziebell. The Mr. Donut mark was then used continuously by Mrs. Jean Ziebell from February 1951 until 1959 in the exact form of the Ragsdale registration, continuously generating goodwill in the business originally established by Mr. Ragsdale. In the middle of this period of continuous use by Mrs. Jean Ziebell the plaintiff acquired record title to the Ragsdale registration 427,509 by an assignment which recited the transfer of goodwill from the estate of Finis Ragsdale for $100.00, which assignment was recorded in the United States Patent Office on July 23, 1956 (R. 580). No evidence was offered at any time that plaintiff was anything other than a bona fide purchaser for value.[10]

Since the Ragsdale mark was in use at the time of the assignment to the plaintiff, goodwill existed, and therefore, the only issue before this Court relevant to the transfer was whether the assignment document (Ex. 5), which in fact recited the transfer of goodwill to the plaintiff, did in fact transfer the then existent goodwill even though there was no actual transfer of customer lists, merchandise, equipment, recipes or other goods from the assignor.

Goodwill is defined in part in Black's Law Dictionary (4th Ed.) as:

> "Goodwill. Something in business which gives reasonable expectancy of preference in race of competition. The custom or patronage of any established trade or business; the benefit or advantage of having established a business and secured its patron-

[10] Not only did the defendants fail to impugn the innocence of the plaintiff in purchasing the registration, although it had ample opportunity to contradict plaintiff's assertions that it innocently purchased the registration when plaintiff learned the Ragsdale registration was blocking its own application for registration of Mister Donut, but it also failed to take depositions during the ample pre-trial discovery period of Mrs. Ragsdale, executrix of the estate of Mr. Ragsdale. It further failed to follow up answers to its own interrogatories that plaintiff's counsel and Chairman of the Board Harry Winokur were the most knowledgeable persons of the facts and circumstances surrounding the acquisition of this registration.

age by the public. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices. It means every advantage, every positive advantage, that has been acquired by a proprietor in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business."

Since goodwill is thus defined as an intangible asset, it follows that a physical transfer of customer lists, merchandise, equipment, recipes or goods is not necessary for a transfer of goodwill. What is important is that patronage existed at the time of the transfer which could inure to the plaintiff's benefit. And merely because that patronage was being generated in the trademark Mr. Donut through sales made in the Everett, Washington store by Jean Ziebell rather than the estate of Finis Ragsdale doesn't lessen the existence of that patronage or its goodwill. Since plaintiff bought the Ragsdale registration from the estate of Finis L. Ragsdale in 1956 as a bona fide purchase for value without any prior knowledge of the 1951 sales to Cohen and Ziebell and duly recorded the assignment document in the Patent Office, the assignment comes squarely within the scope of the assignment provisions of the Lanham Act, § 10, 15 U.S.C. 1060 *supra*, which provides in part:

"An assignment shall be void as against any subsequent purchaser for a valuable consideration without notice, unless it is recorded in the Patent Office within three months after the date thereof or prior to such subsequent purchase . . ."

Because Harold Cohen and Jean Ziebell did not record their claimed assignments in the trademark Mr. Donut from Finis L. Ragsdale within the time limit specified, such assignments are void as against the plaintiff's assignment which was in fact duly recorded. Consequently plaintiff has received good title under the Lanham Act, § 10.

The situation presenting itself here is exactly the type of problem with which the Lanham Act, § 10, was intended to deal. The problem would have been a little more obvious had the situation arisen under slightly different but legally identical circumstances. For example, a representative of the plaintiff on passing through Everett, Washington, might have seen the donut operation without having spoken to Mrs. Ziebell or Mr. Cohen in 1956 and concluded that the mark was desirable. On return to Massachusetts the representative might then have checked the federal records to determine ownership of the Ragsdale registration. On finding the owner was the estate of Finis L. Ragsdale an approach to the estate of Finis L. Ragsdale would have been made. It's obvious that the plaintiff would deal with the record title holder under such circumstances. As a matter of fact, had Cohen and Ziebell properly recorded an assignment of the mark Mr. Donut in the Patent Office, the plaintiff would have attempted to purchase the mark from Ziebell rather than from the estate of Finis L. Ragsdale. What the defendants are trying to do here is to escape the consequence of their infringement by relying upon the negligence of the third party Ziebell. We see no reason for rewarding the defendants because both they and Mrs. Ziebell were negligent while the plaintiff was in fact diligent and did everything it could to locate the registration owner and acquire proper record title.

Recording statutes such as these are of course quite common in real estate, and superior rights of a bona fide purchaser over those of a sleeping earlier purchaser who fails to record his assignment at the proper time is well known. In the present case it is particularly unfair to penalize the diligent bona fide purchaser plaintiff who recorded its purchase when the lackadaisical, infringing defendants are trying to assert rights of unrelated persons years ago in the State of Washington as a loophole for escaping the consequences of their infringement. Thus, the evidence of Cohen and Ziebell merely establishes that there was continuous operation in the State of Washington, generating goodwill under the name Mr. Donut and that the only proper recorded assignment of the mark and the goodwill appurtenant thereto was from the Finis L. Ragsdale to the plaintiff.

The defendants have attempted to show that there was no transfer to the plaintiff of the trademark Mr. Donut with goodwill by showing there was no transfer of property; but the failure to transfer property is irrelevant to the issue of whether or not there is a transfer with goodwill. In *J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F. 2d 960 (C.C.P.A. 1965) the Court of Customs and Patent Appeals stated:

> "It is a matter of no significant import with reference to its impingement upon the validity of the assignment and the rights accruing to appellee thereunder that the assignment was accomplished through an intermediary or that no tangible assets were transferred thereunder nor that the assignor held the mark only one day prior to assignment the mark to appellee."

See also, *Black Panther Co., Inc.* v. *Cook Chemical Co.*, 277 F.2d 177 (C.C.P.A. 1960); *Hy-Cross Hatchery, Inc.* v. *Osborne*, 303 F.2d 947 (C.C.P.A. 1962). Nor is there any significance in the failure to transfer customer lists. *Blanchard Importing Co.* v. *David Sherman Corp.*, 146 U.S.P.Q. 139 (T.T. & App. Bd. 1965). The defendants must in fact show that Finis Ragsdale or his successors did not use the mark MR. DONUT and therefore, goodwill terminated long prior to the transfer to the plaintiff. This they clearly failed to do, and in fact, proved just the opposite. It is not incumbent upon the plaintiff to show the transfer was with goodwill or that it was in use by the assignor. *Cortes* v. *Schenley Distillers, Inc.*, 141 U.S.P.Q. 668 (T.T. & App. Bd. 1964).

As the legitimate owner of the Ragsdale registration the plaintiff is entitled to an injunction restraining use of the identical mark by defendants whose use did not start until ten years after the Ragsdale registration issued and more than a year after plaintiff became record title holder. (15 U.S.C. 1051).

The validity of the Ragsdale registration was never actually challenged by the defendant in any document or in any oral testimony. The only attack on the Ragsdale registration was the collateral attack on the assignment. But whatever infirmity may have occurred some ten years ago in the course of plaintiff's acquisition of the mark MR. DONUT and the Ragsdale registration, the plaintiff cured before defendant's infringement. In fact, the plaintiff actually used the mark MR. DONUT prior to the acquisition of the Ragsdale registration and filed its own application for registration of the mark MR. DONUT on August 24, 1955 (Ex. 7). That the plaintiff decided not to use MR. DONUT in the exact configuration shown in the Ragsdale registration and confined its use to a regular but sporadic use for purposes of exercising ownership rights in the mark MR. Do-

NUT, should not lessen the plaintiff's proprietary right in the mark MR. DONUT which is the dominant portion of the Ragsdale registration. See, *Alford Mfg. Co. v. Alfred Electronics*, 136 U.S.P.Q. 390 (T.T. & App. Bd. 1963), aff'd 142 U.S.P.Q. 168 (C.C.P.A. 1964).

EVEN IF THIS COURT CONCLUDES THAT THE RAGSDALE REGISTRATION 427,509 WAS NOT INFRINGED AND THE RECORDED ASSIGNMENT OF IT TO PLAINTIFF CANNOT FUNCTION AS CONSTRUCTIVE NOTICE TO DEFENDANTS OF PLAINTIFF'S PRIOR CLAIM OF OWNERSHIP OF THE MARK "MR. DONUT" THE DEFENDANTS' USE OF THE MARK "MR. DONUT" SHOULD BE LIMITED TO THE SINGLE SHOP OPENED BY THE DEFENDANTS PRIOR TO THE ISSUANCE OF THE PLAINTIFF'S INCONTESTABLE REGISTRATIONS 683,370 AND 668,784.

Defendants admit that the only MR. DONUT shop in operation before plaintiff's incontestable registration 668,784 (Ex. 3) issued was their MR. DONUT Shop No. 1 which opened in Costa Mesa, California on or about December 3, 1957.

The fifth defense under 15 U.S.C. 1115(b) expressly provides that the defense of adoption without knowledge is available only for ". . . the area in which such continuous prior use is proved." Consequently the defense of innocence is not available for defendants' shops which opened after October 21, 1958, the date of issuance of Registration 668,784 in different trade areas. Defendant D. K. Jones admitted that each shop the defendants opened after the first of necessity operated in a different area in order to avoid direct competition for identical customers. During the course of the trial he testified his first shop was approximately five miles from the next closest shop; that he selected each shop in a different trade area so that these trade areas would not overlap and that the customers for each shop come from within 2 or 3 miles radius of that shop (RT. 371, 372). Consequently, defendants' only use of the mark Mr. Donut before issuance of the plaintiff's incontestable registration 668,784 on October 21, 1958 was the trade area within a radius of two or three miles from the first store at 135 East 17th Street, Costa Mesa, California. The very terms of the statutory defense upon which the defendants rely prohibits these defendants, who have shown use only in one local shop before plaintiff acquired its registration, to balloon the trade area normally attributed to that one local shop serving an area of no more than two or three miles to the entire area of Southern California, or even Orange County, as the district court seems to be suggesting. Having selected a mark previously owned by another, a rigid requirement that the defendants be confined to the specific area in which its first shop operated is not inappropriate. *Cf. Food Center, Inc. v. Food Fair Stores, Inc.*, 242 F. Supp. 785 (D. Mass. 1965); *John R. Thompson Co. v. Holloway*, 366 F.2d 108 (5th Cir. 1966).

The Purpose of the Lanham Act to Make Actionable the Deceptive and Misleading Use of Registered Marks and to Prevent Confusion Among the Purchasing Public and to Afford Maximum National Protection to a Registrant Is Best Served By Preventing Contemporaneous Use By the Latecomer Defendant of Mr. Donut, Where the Plaintiff and Its Nearly Two Hundred Franchisees Took Every Step Possible to Acquire a Nationwide Right and Title in the Marks Mr. Donut and Mister Donut and to Put the World on Notice of Plaintiff's Claim of Ownership of Mr. Donut and Mister Donut, While the Defendant Totally Failed to Take Even the Most Elementary Precautions to Determine Whether or Not the Mark Mr. Donut Was Available.

A national registration system serves a number of purposes. Weighing the acts of omission by defendants against the positive steps taken by plaintiff under the Act to protect Mister Donut in the light of these purposes requires a conclusion that the defendants must be enjoined from further infringing use of Mr. Donut.

When a person wants to begin using a particular trademark or trade name, he can check the public records of the United States Patent Office to see if any mark confusingly similar has been registered or an application filed for registration before that person commences promoting his business under a mark which a prior user can stop that person from using. When a person discovers that there is an outstanding prior registration that would interfere with his intended use of the mark and he still wants to use the mark, he can contact the owner of the registration and obtain whatever rights he needs to enjoy the exclusive use of the chosen mark. And that is exactly what plaintiff did here. When plaintiff discovered that there was an outstanding registration of Mr. Donut, plaintiff contacted the owner of the registration and obtained all rights in the registered mark.

If a person after investigating the United States Patent Office records and clearing up any possible obstacles to exclusive use of the chosen mark in commerce learns that he has the exclusive rights to the chosen mark, he can apply for registration of that mark. The Patent Office will not grant the registration until publishing the mark for opposition by someone like a prior user who would be damaged by the registration. And if a person with a registration continues to use his mark for five years, he can apply to have his registration made incontestable and conclusive evidence of his exclusive rights to use the mark, subject to the seven enumerated defenses in section 33(b). That is what the plaintiff did.

After taking all the possible steps plaintiff could to insure that any adverse claimant to MISTER DONUT had notice of plaintiff's claim of exclusive ownership, plaintiff proceeded to develop a tremendous business under its registered mark that has been expanding nationally progressively outward from its place of origin in Massachusetts in 1955. Now, more than ten years and many MISTER DONUT shops later, when plaintiff is franchising in California, the sleeping defendants who apparently never spent the $25 or $30 or less for a search of the United States Patent Office records back in 1957 which would have put them on actual notice of plaintiff's claim to ownership of MISTER DONUT and MR. DONUT and never opposed any of plaintiff's registrations of MISTER DONUT or sought to cancel even one of these registrations, now claim that their negligence or nonfeasance should be rewarded by allowing them to continue to use the mark MR. DONUT. Rewarding defendants in this fashion not only would render useless the diligence of plaintiff, but would also perpetuate a source of confusion to the consuming public and would impair the property rights of scores of independent businessmen owning MISTER DONUT franchises. Such a result would frustrate fundamental purposes of the Trademark Act of 1946 in stimulating prospective users of marks to check them in the United States Patent Office first and of enabling a registrant to rely on his incontestable registration as conclusive proof of his exclusive right to use the mark in commerce and promote his business under that registered mark. Moreover, it would encourage individuals not to search the Patent Office records and not to take reasonable steps to see if a mark is available for adoption. Fundamental principles of equity and consistency with the statutory purpose of the Lanham Act require that the napping defendants be enjoined from further infringing use of MR. DONUT and additionally benefiting from the goodwill associated with plaintiff's MISTER DONUT promoted over a period of nearly ten years, goodwill built up to its present high value through the expenditure by plaintiff of considerable effort, time and money.[11]

[11] S. Rep. No. 1333, U.S. Code Congr. Ser., 79th Cong., 2d Sess. 1946, p. 1274 which recommended passage of the Lanham Act, in part, stated: "The purpose of this bill is . . . to eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal, to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple, and relief against infringement prompt and effective." See also footnote 9, infra, p. 37.

UNDER THE APPLICABLE STATUTORY LAW OF THE STATE OF CALIFORNIA, THE PLAINTIFF IS THE ORIGINAL OWNER OF "MISTER DONUT" AND "MR. DONUT" BECAUSE IT FIRST ADOPTED THESE MARKS BEYOND THE LIMITS OF CALIFORNIA: AND AS THE FIRST OWNER IT IS ENTITLED BY THE APPLICABLE LAWS OF THE STATE OF CALIFORNIA TO AN INJUNCTION AGAINST FURTHER USE OF AN INFRINGING MARK BY THE DEFENDANTS REGARDLESS OF WHETHER THE DEFENDANTS KNEW OF THE PLAINTIFF'S MARKS AT THE TIME THEY STARTED THEIR INFRINGING USE.

At the time the defendants first started to use their infringing trademarks in the State of California and at the time this civil action was tried, Cal. Bus. & Prof. Code, Div. 6, § 14,270, provided:

> "Original owners. Any person who has first adopted and used a trademark, whether within or beyond the limits of this State, is its original owner."

This section of the Statnte found its roots in the common law as originally interpreted in this State in *Derringer* v. *Plat*, 29 Cal. 292 (1865). In the *Derringer* case, the Supreme Conrt of California construed the common law as being affirmed by Section 9 of the Statute of 1863 which was then in force and provided:

> "That the person who has first adopted and used a trademark, whether within or beyond the limits of this State, shall be considered its original owner, with full rights of property, and entitled to the same protection by snits of common law as in the case of other personal property." (Id. at 298).

In the *Derringer* case, defendant was enjoined from infringing a trademark of a plaintiff which was first used outside of the State of California. This broad interpretation has been consistently followed by both state and federal courts in applying California law. This Court had the occasion to review Section 14270 in *Stork Restaurant* v. *Sahati*, 166 Fed. 2d 348 (9th Cir. 1948). In this case, an owner of the New York Stork Club which operated only in New York, was entitled to an injunction foreclosing further use of its trademark by a small bar in San Francisco. In rejecting contentions that the defendant's use was without fraudulent intent, the court approvingly quoted the Restatement:

> "The Actor may be enjoined for the future despite the fact that he adopted and used his designation *in ignorance of the other trademark.*" (emphasis added)

The innocence and lack of knowledge of the plaintiff's prior adoption of the mark was also held irrelevant in this State in several other cases. See, *Hall* v. *Halstrom*, 289 P. 668 (Cal. D.C. 1930), and cases cited; *Evelyn Woods Reading Dynamics Institute* v. *Zimmerman*, 134 U.S.P.Q. 475 (N. Cal. 1962). See also, Nims, Unfair Competition and Trademarks, Vol. 1, p. 627 (4th Ed.). The rationale for affording protection to the first comer regardless of knowledge or fraudulent intent of the defendant's subsequent use is based upon the right of the public to protection from fraud and deceit. *Stork Restaurant* v. *Sahati*, *supra*. And in this day of rapid transportation and substantial travel between states the soundness of such a rationale which affords a plaintiff protection of its mark regardless of knowledge of others and subsequent adoption of marks is obvious. *Cf. Quality Courts United* v. *Quality Courts*, 140 F. Supp. 341, 349 (M.D. Pa. 1956).

The district court did not consider this California statute or common law and offered no opinion with respect to plaintiff's allegations in its Complaint of right to relief under California law.

The application of California law to the present case is clear and unequivocal. Under Cal. Bus. & Prof. Code § 14270, knowledge of prior adoption of the mark by another is irrelevant in determining ownership rights. Consequently, the plaintiff as first user is the owner of "MISTER DONUT" and "MR. DONUT". Nor can there be any serious doubts that the contemporaneous use of the plaintiff's and defendants' trademarks are likely to cause confusion since their businesses are identical, and since plaintiff is actively developing its business not only in the State of California, but within Los Angeles and Orange County. And under California law such likelihood of confusion is enough to establish liability. *Stork Restaurant* v. *Sahati, supra; Brooks Bros.* v. *Brooks Clothing of California*, 60 F. Supp. 442 (S.D. Cal. 1945). Thus, the appropriation by defendants of plaintiff's marks is actionable. Cal. Bus. & Prof. Code § 14203. *Cf. Evans* v. *Shockley*, 58 Cal. App. 427 (D.C. 1922).

Cal. Bus. & Prof. Code § 14200ff was repealed and replaced by a revised code during the 1967 regular session of the California Legislature. (Senate Bill No. 864.) This revised Act repealed old Section 14270, but 14210 of the new Act provides that "Nothing in this chapter shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law," and new Section 14212 provides, "This chapter shall not affect any suit, proceeding or appeal pending on the effective date of this chapter." Since the new Act became effective during the pendency of this appeal, it is clear from the foregoing quotations that the old Act is still applicable to these proceedings.

California Law Requires That Defendants' Use of a Confusingly Similar Trade Name to That of the Plaintiff Be Enjoined in Order to Protect the Public.

The defendants incorporated under the name Mr. Donut, Inc. after this suit had commenced and have otherwise expanded their use of Mr. Donut as a trade name. Since the law of unfair competition with respect to trade names is broader than the common law or statute law of trademarks, relief is even more demanding in respect to defendants' unauthorized tradename use of Mr. Donut. *Phillips* v. *The Governor & Co.*, 79 F. 2d 971 (9th Cir. 1935). Since Cal. Bus. & Prof. Code § 14270 provides plaintiff's first use outside of California establishes it as senior user of the marks Mr. Donut and Mister Donut, the issue of defendants' innocence or lack of fraudulent intent in adopting its name is irrelevant. *Cf. Visser* v. *Macres*, 214 Cal. App. 2d 249 (1963); *Hoover* v. *Groger*, 12 Cal. App. 2d 417 (1936). The issue to be determined even when considering operations in remote parts of California is simply whether the public will be deceived by continued use of a name by the latecomer. *MacSweeney Enterprises, Inc.* v. *Tarantino*, 235 Cal. App. 2d 549 (1965). As a consequence defendants' unauthorized tradename use of Mr. Donut should also be enjoined as requested in the complaint. (R. 10, 11, 207, 208)

The District Court Erred in Suggesting that Fairway Foods, Inc. v. Fairway Markets, Inc. Might Authorize the Enjoining of Plaintiff from Expansion of Its Use of Mr. Donut in Southern California and Further Erred in Not Giving Full Weight to the Incontestable Nature of Plaintiff's Registration Nos. 683,370 and 668,784.

The defendants urged in their brief and the court apparently concurred that the defendants might by virtue of their use of MR. DONUT in Southern California have some future right to enjoin plaintiff's use of MISTER DONUT in Southern California. In reaching this Conclusion of Law 6 (R. 583) the court cited *Fairway Foods, Inc.* v. *Fairway Markets, Inc.*, 227 F.2d 193 (9th Cir. 1955), and apparently either disregarded or did not fully understand the nature and rights afforded a registration which becomes incontestable under the provisions of the Lanham Act, § 15 (15 U.S.C. 1065).

In *Tillamook Country Creamery Association* v. *Tillamook Cheese and Dairy Association*, 345 F.2d 158 (9th Cir. 1965) this court held the incontestable features of the Lanham Act were purely defensive and not offensive. We need not consider here the apparent split developing in the various circuits with respect to whether the incontestable feature of a registration has some offensive features. *Cf. John R. Thompson Co.* v. *Holloway, supra; Nielsen* v. *American Oil Co.*, 203 F. Supp. 473 (D. Utah 1962). Rather we are concerned with plaintiff's defensive right under its incontestable registration to trade freely and establish shops and franchises anywhere in the United States, including if it so desires, anywhere in Orange County. The Lanham Act § 15, states simply that plaintiff's "right . . . to use . . ." its ". . . registered mark in commerce . . . shall be incontestable." under certain conditions, of which only one is relevant to this case. That condition is that plaintiff's mark must not infringe ". . . a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of publication under this Act of such registered mark . . .". Since the defendants did not use their mark until December 3, 1957 about three weeks after publication of Registration 668,784 (Ex. 3), on November 12, 1957, defendants do not come within this sole condition and therefore have no right to assert any affirmative claims under section 15. Under these circumstances, and if the incontestable feature of the Lanham Act is to have any meaning, the defensive nature of this Act should at the very least assure the owner of an incontestable registration that it may use its mark when and as it pleases. It would be hard to imagine that Congress in stating that an incontestable ". . . registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce . . ." (15 U.S.C. 1115(b)) meant anything less.

CONCLUSION

For the foregoing reasons reversal of the district court's judgment is solicited.

Dated: January 8, 1968.

Of Counsel:

Charles Hieken

Respectfully submitted,

Wolf, Greenfield & Hieken

By David Wolf
Leonard H. Munroe

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

David Wolf, *Attorney*

Appendix A
Exhibits

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APPENDIX B

Patent Office Trademark Rule of Practice No. 1.12 (Oct. 1956 Ed.)

Assignment records open to public inspection. The assignment records, including digests and indexes, are open to public inspection and copies of any instrument recorded may be obtained upon payment of the fee therefor. An order for a copy of an assignment should give the identification of the record. If identified only by the name of the patentee and number of the patent, or in the case of a trademark registration by the name of the registrant and number of the registration, or by name of the applicant and serial number of the application, an extra charge will be made for the time consumed in making a search for such assignment.

No. 22116
No. 22116-A

IN THE

United States Court of Appeals for the Ninth Circuit

MISTER DONUT OF AMERICA, INC.,
Appellant,

vs.

MR. DONUT, INC., et al,
Appellees.

MR. DONUT, INC., et al,
Appellants,

vs.

MISTER DONUT OF AMERICA, INC.,
Appellee.

DEFENDANTS-APPELLEES' BRIEF

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DEFENDANTS-APPELLEES' BRIEF

INTRODUCTION

In this case plaintiff-appellant Mister Donut of America, Inc. presents for review a judgment of the District Court dismissing its complaint and supplemental complaint for trademark infringement, unfair competition and dilution of plaintiff's trademarks (Appeal No. 22116), and defendants-appellees Mr.

Donut, Inc. et al have appealed from the failure of the District Court to award them their attorney's fees under Title 15 U.S. Code 1120 (Appeal No. 22116-A).

This Brief is common to both appeals in accordance with the Order of this Court filed January 19, 1968. In this Brief plaintiff-appellant is referred to as "plaintiff" and defendants-appellees as "defendants." Citations of record are the same used by plaintiff in its Brief.

STATEMENT OF THE CASE

Defendants Mr. Donuts, Inc., et al are in general agreement with Plaintiff-Appellant's Brief so far as the Jurisdictional Statement and Proceedings Below are concerned. Defendants, however, wish to supplement the Statement of Facts as follows:

PLAINTIFF'S PURCHASE OF THE RAGSDALE REGISTRATION

As indicated in Plaintiff-Appellant's Brief, plaintiff's attorneys learned of the Ragsdale Registration No. 427,509, in August 1955 when plaintiff's application for registration of Mr. Donut was rejected on the basis of the prior Ragsdale registration. Upon being apprised of the Ragsdale registration, plaintiff's attorneys paid $100.00 for an assignment thereof from Ragsdale's widow (R. 78). *So far as the record is concerned, plaintiff made no investigation whatever as to whether or not the Ragsdale estate was at the time of such assignment still actually using the trademark of the Ragsdale registration.*

ARGUMENT

Re Specification Of Error 1

> "1. The trial court erred in not finding that the use of Mister Donut and Mr. Donut respectively by plaintiff and defendants in operating and franchising donut shops is likely to cause confusion or mistake."

So far as defendants understand the above specification of error, plaintiff contends that the District Court refused to find infringement because it erroneously believed competition to be necessary for finding infringement, whereas the real test of infringement is confusion or likelihood of confusion of the marks.

Defendants submit that plaintiff's reasoning is both illogical and unsound. Whether or not the District Court made a finding regarding confusion was immaterial to its final holding of non-infringement. This is true because the Court held non-infringement on two grounds. First, because defendants established a defense under 15 U.S.C. 1115(b) (5), and secondly, on the basis that defendants' activities were and are outside the Lanham Act. The fact that confusion was likely or even that confusion actually exists has no legal significance under these circumstances.

Re Specification Of Error 2

> "2. The trial court erred in not finding that plaintiff's prior adoption and continuous use of Mister Donut and Mr. Donut beyond the limits of California entitled it to preclude use of Mr. Donut in California by defendant under the law of California."

It would have indeed been unusual for the trial court to find for plaintiff under California law inasmuch as *plaintiff neither during the trial nor in its extensive brief submitted after trial cited any fact or law even urging such a holding.* Instead, plaintiff saved this line of argument for this Court.

However, even had plaintiff urged California law at the trial of this case the results would not have been affected.

As this Court pointed out in the *Stork Restaurant* case relied upon by defendants, the trademark provisions of California law are in accord with the general law. The general law on this subject was stated by this Court in *Tillman and Bendel v. California Packing Corporation*, 63 F.2d 498 (1933) as follows:

> "The very decisions that hold the prior appropriator's trade-mark rights to be paramount, as quoted above, contain a limitation that precludes the appellant's assertion of those rights in the east. For example, in the Rectanus Case, supra, we find the qualification thus stated, at page 100 of 248 U.S., 39 S. Ct. 48, 51: 'The reason for the rule does not extend to a case where the same trade-mark happens to be employed simultaneously by two manufacturers in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another. It would be a perversion of the rule of priority to give it such an application in our broadly extended country that an innocent party who had in good faith employed a trade-mark in one state, and by the use of it had built up a trade there, being the first appropriator in that jurisdiction, might afterwards be prevented

from using it, with consequent injury to his trade and good will, at the instance of one who therefore had employed the same mark but only in other and remote jurisdictions, upon the ground that its first employment happened to antedate that of the first-mentioned trader.'

The application of this geographical rule is even more fully expounded in the Hanover Case, supra, at page 415 of 240 U.S., 36 S. Ct. 357, 361; 'In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appears that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like'."

Applying the above law to the facts in the present case, defendants began using the Mr. Donut mark in California prior to the time they had actual or constructive notice of plaintiff's use thereof. Accordingly, under California law, defendants cannot now be precluded from further use of such mark.

The facts in the *Stork Restaurant* case relied upon by plaintiff differed from the facts in this case in that the original New York night club was known to many people from San Francisco who had patronized such New York club. The same is true with respect to the *Brooks Brothers* case cited by plaintiff, the Court holding that extensive advertising of the first user's mark in California made the name known in California prior to the time the second user adopted such name.

Re Specification Of Error 3

> "3. The trial court erred in not finding plaintiff's operation and franchising of donut shops in California and other states under its valid federally registered mark MISTER DONUT entitled it to preclude further intrastate use by defendants of a confusingly similar mark."

Specification of Error 3 is apparently directed at Conclusion of Law 5 wherein the District Court held that under the authority of *Fairway Foods, Inc. v. Fairway Markets, Inc.*, 227 F.2d 193 (9th Cir. 1955) defendants' activities were and are outside the Lanham Act because they do not affect interstate commerce. The *Fairway* case sets forth the controlling law in this circuit and the facts therein are virtually identical to the facts in the present case.

In the *Fairway* case the plaintiff urged unfair competition and infringement of its eight federally registered trademarks for "Fairway." The Plaintiff sold foodstuffs to over 1250 "Fairway" stores in over 1000 cities and towns in Minnesota, North and South Dakota, Wisconsin, and Iowa, but not in California, although it purchased foodstuffs under its label "Fairway" from California suppliers. Its 1250 "Fairway" stores included licensee stores which were generally small, independent owner-operated markets identified as "Fairway" markets and the like. Defendants, *after* plaintiff's use of the word "Fairway," began to use the word "Fairway" to identify its retail food market in Monterey Park, California and used the word "Fairway" on delicatessen wrappings. Defendant's adoption of "Fairway" was without actual knowledge of plaintiff's prior use. This Court did not find unfair competition by defendant, based upon the fact that neither party sells or tries to sell or offers to sell anything within the same territory, that is, there was no competition.

This Court then examined the question as to whether, under the Trademark Act of 1946 (15 U.S.C.A. Section 1051 et seq.), plaintiff was entitled to exclusive use of the word "Fairway" throughout the entire country and found that plaintiff was not, stating: (Page 256)

> "While it is true that activities which in isolation might be deemed local, may affect commerce due to interlacings of business across state lines, in absence of a showing that the business is a part of a coordinated interstate system substantially affecting commerce, the activities of retail grocers purchasing and selling their wares exclusively intrastate are not a permissible field for Congressional regulation under the Commerce power.
>
> The finding of the district court in our case was that '[d]efendants purchase all of their food and other products and sell all of their food and other products, within the County of Los Angeles, State of California. Defendants advertise exclusively to the buying public located in the County of Los Angeles, State of California, and said advertising is conducted exclusively through local newspapers, throw-sheets, post cards, radio broadcasts, promotional sales and other advertising made, published or circulated within said County.' "

The similarity of the facts in the present case to that in the *Fairway* case will be made apparent by Finding of Fact 19 reproduced herebelow:

> "19. Defendant Mr. Donut, Inc.'s seven shops are each located in Orange County, California, and all of the equipment and supplies used in the shops have been and are purchased exclusively in the counties of Orange and Los Angeles, California. All of defendants' products have been sold exclusively in Orange County, California. All advertising for defendants' shops has been limited to the Orange County area and no attempt has ever been made to attract customers from any area other than Orange County. Defendants' shops are each located on local streets which are not Federal or State marked highways. Most of the customers at defendants' shops are regular or repeat customers and many of the few customers driving to defendants' shops in automobiles bearing non-California license plates are regular customers. The defendants' shops normally cater to customers within a radius of about four (4) miles."

On the basis of the facts set forth in Finding 19 the District Court held in Finding 22 that:

> "Defendants' business is strictly local in nature and does not affect interstate commerce."

In accordance with F.R.C.P. Rule 52 (a), Findings of Fact 19 and 22 should not be set aside by this Court unless clearly erroneous. Plaintiff has failed to establish these findings as being in error and accordingly such findings should be upheld. This case therefor comes directly within the doctrine of the *Fairway* case whereby the District Court properly concluded the Lanham Act did not apply.

Re Specification of Error 4

> "The trial court erred in not finding the recorded assignment of MR. DONUT Ragsdale registration to plaintiff and plaintiff's pending applications for federal registration of MISTER DONUT at the time defendants first used MR. DONUT were constructive notice of plaintiff's claim to MR. DONUT under the Lanham Act."

As a basis for the above specification of error, plaintiff contends that defendants had constructive knowledge of plaintiff's use of the mark Mr. Donut, because at the time defendants first used the mark, "publicly available records in the Patent Office showed that the plaintiff claimed ownership of the trademarks Mr. Donut and Mister Donut." The statute controlling the nature of "publicly available records" which may be relied upon as giving constructive notice is set forth on Page 22 of plaintiff's Brief, i.e. 15 U.S.C. 1115(b).

Referring to section 15 U.S.C. 1115 (b) it will be noted that the words "*prior to registration of the mark under this Act or publication of the registered mark under subsection C of section* 12 *of this Act*" clearly set forth which "publicly available records in the Patent Office" provide constructive notice of ownership of a trademark. In view of the clear language of this code section, defendants cannot understand how plaintiff can conscientiously contend that in addition to the records designated in such code section, the public should also be required to investigate assignment records and/or publication of unregistered marks. The unsoundness of plaintiff's contention is evidenced by its failure to cite any case authority for its position.

Re Specification Of Error 5

> "The trial court erred in holding defendants may open or franchise donut shops in areas other than that trade area in which they operated before issuance of plaintiff's federal registration for MISTER DONUT."

As the basis for the above specification of error plaintiff relies upon the fifth defense under 15 U.S.C. 1115(b) providing that the defenses are available only for the area for which such continuous prior use is proved. This argument, however, completely ignores the fact that the analogous prior decisions hold the first user of a trademark within a state obtains *state-wide* protection for a mark, *Federal Glass Co. v. Loshin*, 224 F.2d 100 (CA2 1955). *Western Oil Refining Co. v. Jones*, 27 F.2d 205. There is no reason why the same rule should not apply in this case.

The *Food Center Inc.* case cited by plaintiff at Page 29 of its Brief, is not in point since in that case the plaintiff and defendant both utilized the term Food Fair as part of their trademarks. In prior litigation, plaintiff was permitted to use Food Fair only when prefaced by a descriptive word, but no restriction was placed on defendant's use of Food Fair. Plaintiff then continued to do business in Eastern Massachusetts. Fifteen years later defendant acquired sites in Western Massachusetts in order to open additional Food Fair stores. Plaintiff then attempted to stop such expansion by defendant. Defendant counter-claimed for an injunction against plaintiff's use of the term Food Fair. The Court dismissed both the Complaint and the Counterclaim holding that plaintiff's area of use was limited to Western Massachusetts.

In the present case, plaintiff contends that the contemporary use of Mr. Donut and Mister Donut by plaintiff and defendants is likely to result in confusion. Defendants stipulate that at least at the retail level confusion is likely. Accordingly, since the Southern California area is rapidly becoming a megalopolis, it is only logical that defendants "area" as defined by 15 U.S.C. 1115(b) be designated the entire Southern California area. In this regard, defendants fully intend to expand within the Southern California area but have held off such expansion pending the outcome of this lawsuit.

Re Specification Of Error 6

> "6. The trial court erred in not holding a recorded assignment from the record title holder of the trademark MR. DONUT and its federal registration 427,509 together with the good will represented thereby at a time when the mark was in active use for valuable consideration conveys good title in the trademark to plaintiff in the absence of an actual transfer of physical assets."

As the basis for the above specification of error, plaintiff contends that even though it did not acquire goodwill in its purchase of the Ragsdale registration, the assignment was not void because the prior purchaser of the trademark and goodwill was at the time generating goodwill. This contention is completely at odds with well-established trademark law holding that an assignment in gross serves as an abandonment of a trademark. This doctrine is succinctly set forth at Page 187 of Trademark Law and Procedure published 1959 by the Bobbs-Merrill Co., Inc., as follows:

> "There are no rights in gross in marks. Marks cannot exist apart from the goodwill of the business with which they are associated (citing cases). If the mark and the goodwill of the business which it represents are separated, the rights in the mark are destroyed. This is sometimes referred to as an abandonment, but strictly speaking it is not an abandonment because an essential element of abandonment is an intention to abandon which is not present in the situation of an invalid assignment. However, the principal effect is the same; namely cutting off the ability to protect the mark against others * * *
>
> For the assignment to be valid, there must be an effective transfer of the goodwill from the assignor to the assignee. The mere recitation in a contract of assignment of the transfer of the goodwill is insufficient where the surrounding circumstances indicate that the goodwill in fact was not transferred to the assignee. (Citing cases) * * *
>
> To the same effect are the cases holding, that where a company has ceased doing business and no longer has any goodwill to transfer, the assignment of the mark is ineffective. (citing cases)"

Lest there be any doubt that the Lanham Trademark Act of 1952 made any change in this doctrine, this Court's attention is respectfully directed to the following language from *Uncas v. Clark and Coombs;*

DC D. Rhode Island; (200 F supp. 831 1962):

"The Lanham Act, 15 U.S.C. § 1060, provides that a trademark shall be legally assignable only 'with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark * * *,' Goodwill being inseparable from the business with which it is associated, this requirement of the transfer of goodwill restates the common law rule that a trademark can only be transferred with the business or part of the business connected with the use of and symbolized by such mark.

The assignment of December 5, 1958 to the plaintiff purported to include 'the goodwill of the business' in connection with which said trademark was used. As hereinbefore recited, the testimony established beyond doubt that no part of the ring business, formerly owned by Griffith, was transferred with said assignment. In fact, there was no ring business to be transferred. At the time of said assignment Irons and Russell was not engaged in the ring business and had already sold all the ring tools, dies and inventory of said business and divested itself of the sample board used by Griffith when it was engaged in that business.

The assignment of the trademark was, despite said recital, obviously an assignment in gross and was legally void. Hence, it conferred no rights upon the plaintiff. United Drug Company v. Theodore Rectanus Company, 248 U.S. 90; American Broadcasting Co. v. Wahl Co., 121 F.2d 412, 50 USPQ 156; Holly Hill Citrus Growers' Assn. v. Holly Hill Fruit Products, Inc., 75 F.2d 13, 24 USPQ 229; National Mineral Co. v. Bourjois, Inc., 62 F.2d 1, 15 USPQ 248; Sexton Mfg.

Co. v. Chesterfield Shirt Co., 24 F.2d 288; President Suspender Co. v. Mac William, 238 F. 159, cert. den'd, 243 U.S. 636; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co., 113 F. 468; Nettie Rosenstein, Inc. v. Princess Pat., Ltd., 220 F.2d 444, 105 USPQ 226; LaFayette Brewery, Inc. v. Rock Island Brewing Co., 87 F.2d 489, 32 USPQ 391; E. Leitz, Inc. v. Watson, 152 F. Supp. 631, 113 USPQ 409, aff'd 254 F.2d 777, 117 USPQ 13; Stern Apparel Corporation v. Raingard, Inc., 87 F. Supp. 621, 83 USPQ 293; Reconstruction Finance Corp. v. J. G. Menihan Corp., 28 F. Supp. 920, 42 USPQ 504; Restatement of Torts, sec. 755."

See also *Scott v. Annapolis Electroacoustic Corp.*, DC Md 195 F Supp 208 (1961).

The doctrine set forth in the *Uncas* case is so well established that it is seldom questioned and accordingly defendants could not locate any circuit court decisions subsequent to the date of the *Uncas* decision.

Applying the above law to the facts of the present case, Ragsdale sold his entire doughnut shop business to Cohen and his associates on or about February 14, 1951. Thereafter, this business was operated by Mrs. Ziebell continuously until 1959 in conjunction with the Ragsdale trademark. Accordingly, when plaintiff purchased the Ragsdale registration in 1956, there was no goodwill or any other part of the Ragsdale business that was transferred with this Assignment. Under these circumstances, the Assignment from Ragsdale's widow to plaintiff of the Ragsdale mark was an assignment in gross and hence void. Since this assignment was void, plaintiff cannot be termed an "assignee" of the Ragsdale mark or its registration so as to claim the constructive notice benefit of 15 USC 1072.

If any further argument is required to establish that plaintiff received nothing from the assignment of the Ragsdale mark, it should be noted that *the Ragsdale mark was abandoned before it was even purportedly assigned to plaintiff.* 15 USC 1127 holds that a prima facie abandonment of a mark takes place upon non-use for two consecutive years.

> "Abandonment of mark. A mark shall be deemed to be 'abandoned' —
>
> (a) when its use has been discontinued with intent not to resume. Intent not to resume may be inferred from circumstances. Non-use for two consecutive years shall be prima facie abandonment."

As noted hereinbefore, Mrs. Ziebell testified that after Ragsdale's sale of his doughnut operation on or about February 14, 1951, he did not again engage in the sale of doughnuts, and that he died within two years after this sale. Thus, defendants provided evidence of a prima facie abandonment of the Ragsdale mark prior to the purported assignment thereof to plaintiff in July 1956. This evidence was not rebutted by plaintiff.

To rebut the clear evidence of abandonment of the mark established by defendants, plaintiff in its Brief attempts to convince this Court that the notice provision of 15 USC 1060 with respect to assignments in some manner validates the assignment of the Ragsdale mark to plaintiff. This argument is completely fallacious, since this section of the statute is merely a typical first-to-record type of provision which protects a good faith purchaser of a trademark registration against the claims of a prior purchaser who failed to record his proper assignment. Plaintiff also contends in its Brief that it was entitled to the goodwill being generated in the Ragsdale mark by Mrs. Ziebell's use of such mark. This is indeed a unique concept and it is not surprising plaintiff cannot cite any law in support thereof.

As authority for plaintiff's contention that the assignment of the Ragsdale registration was valid, plaintiff's Brief cites *J. C. Hall v. The Hallmark Cards, Inc.* The facts in the *J. C. Hall* case, however, are completely at odds with the facts in the present case. *The J. C. Hall* case involved a trademark opposition before the Patent Office. The opposer relied solely upon testimony that the original trademark owner employed an intermediary to obtain the assignment of the registration, that this intermediary did not receive any records, etc. and that he held the registration for only one day before assigning it to the trademark owner. There was no lack of use of the mark by the trademark owner for a period of approximately five years as in the present case.

The *Black Panther* case cited by plaintiff is also of no importance in the present situation. In *Black Panther* there was a period of non-use of one month. Similarly, the *Hy-Cross Hatchery* case does not aid plaintiff since it concerns a cancellation proceeding in the Patent Office. The *Blanchard* and *Cortes* cases cited in plaintiff's Brief are likewise of no importance in the present situation. *Blanchard* was another trademark cancellation case in the Patent Office and it holds that where goods were being sold to the general public and there was no customer list it would not be necessary to include a customer list in the trademark assignment. The *Cortes* case was a trademark opposition in the Patent Office and merely stands for the proposition that one opposing a trademark registration must overcome by competent evidence a trademark owner's prima facie contention of assignment validity.

Plaintiff further contends that defendants are trying to escape the consequence of their infringement by relying upon negligence of Mrs. Ziebell in not registering an assignment of the Ragsdale registration in the Patent Office,

> "while the plaintiff was in fact diligent and did everything it could to locate the registration owner and acquire proper record title."

This argument of course conveniently overlooks plaintiff's complete lack of diligence in failing to determine the true status of the Ragsdale doughnut operation at the time it obtained an assignment of the Ragsdale mark, despite the fact that plaintiff at that time employed competent trademark attorneys. Even a simple investigation by such attorneys would have uncovered the fact that Ragsdale had sold his doughnut operation in 1951 and that it was then being conducted by Mrs. Ziebell. Plaintiff then could have obtained a valid assignment from Mrs. Ziebell. Assuming, however, that both Mrs. Ziebell and plaintiff were negligent it would be inequitable to penalize defendants herein for such negligence.

Re Specification Of Error 7

> "The trial court erred in presumably holding that actual competition between the parties is necessary in establishing infringement of a federally registered trademark."

Specification of Error 7 is apparently a restatement of Specification of Error 1. Accordingly, defendants incorporate herein by reference their remarks pertaining to Specification of Error 1.

Re Specification Of Error 8

> "The trial court erred in not holding the prima facie valid records of the Patent Office in 1956 showing as assignment of MR. DONUT Registration 427,509 to plaintiff bars a defense of good faith adoption in October 1957 of the same mark by defendants."

Specification of Error 8 is apparently a restatement of Specification of Error 4. Accordingly, defendants incorporate herein by reference their remarks pertaining to Specification of Error 4.

Re Specification Of Error 9

> "9. The trial court erred in not holding that plaintiff's rights in the Ragsdale trademark MR. DONUT and its registration were superior to those of Jean Ziebell because plaintiff was a bona fide purchaser for valuable consideration who recorded an assignment under 15 U.S.C. §1060."

Specification of Error 9 is apparently a restatement of Specification of Error 6. Accordingly, defendants incorporate herein by reference their remarks pertaining to Specification of Error 6.

Re Specification Of Error 10

> "10. The trial court erred in not holding the plaintiff, who now operates or franchises 200 MISTER DONUT Shops from Massachusetts to California, is entitled to an injunction against defendants' operation and franchising of seven MR. DONUT Shops in Orange County, California, where plaintiff adopted and used the mark MISTER DONUT in interstate commerce in 1955, took all steps possible to assert ownership of this mark, including the purchase and recording of an assignment in the United States Patent Office in 1956 of a MR. DONUT registration, the filing of three applications for federal registration in 1955 and 1957 (two of which now have matured into incontestable registration), and the obtaining of numerous state trademark registrations, and where defendants long afterwards adopted without investigation the confusingly similar mark MR. DONUT without any prior investigations, and are using it in a manner which actually damaged plaintiff and confuses the public."

The only serious contention appearing in Specification of Error 10 not covered in defendants' preceding arguments is the reference to the fact that two of defendants' registrations are incontestable. Plaintiff's reference to incontestability is of no importance since *the incontestability provision of* 15 *U.S.C.* 1065 *is a defensive provision and has no offensive effect whatsoever.* All that such incontestability affords is a guarantee that in the absence of fraud plaintiff's registration cannot be cancelled in a cancellation proceedings before the Patent Office. This law is well-settled in this circuit and this Court's attention is respectfully directed to *Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association*, 345 F.2d 158 decided by this Court in April 1965. The following language is apposite:

> "*The provision relating to incontestability is a defensive provision; it has no offensive effect.* If plaintiff has attained incontestability of its mark, its registration could not be cancelled by a proceeding to cancel the same. But this does not aid the plaintiff in any claim that it has an exclusive right to the name or mark or that it may rely on the same as a basis for an injunction against the defendant. In John Morrell & Co. v. Reliable Packing Co., 7 Cir., 295 F.2d 314, 316, 131 USPQ 155, 156-157, the court said of incontestability: 'This section (15 U.S.C. § 1115) was intended to protect a registrant from having its mark cancelled by a prior user claiming superior rights.' The court then went on quoting from other authority: '*These statements seem to reflect a misconception of the effect of a registration of a mark, the right to the use of which has become incontestable. The effect of "incontestability" is a defensive and not an offensive effect.*' " (Emphasis added)

THE DISTRICT COURT ERRED IN NOT AWARDING DEFENDANTS THEIR ATTORNEYS' FEES INCURRED IN DEFENDING THIS ACTION.

As a basis for their request for attorneys' fees, defendants relied upon 15 USC 1120.

According to 15 USC 1120:

> "Any person who shall procure registration in the Patent Office of a mark by a false or fraudulent declaration or representation, oral or in

writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof."

The leading case interpreting the above code section is *Academy Awards Products, Inc. v. Bulova Watch Co., Inc.*, 233 F.2d 449 (CA 2) 1956. In this case, the Second Circuit Court of Appeals affirmed the District Court's award of reasonable attorneys' fees incurred in defending a charge of trademark infringement where the trademark registration was obtained through false statements made to the Patent Office. The citation of the District Court's decision is 129 F supp. 780.

In the *Academy* case the details of the plaintiff's false statements made to the Patent Office are set forth in a cancellation proceeding before the Patent Office; *Academy of Motion Picture Arts and Sciences v. Academy Award Products, Inc.*, 89 USPQ 451 (No federal citation available). The latter decision lists several examples of the activities relied upon by the plaintiff in falsely obtaining its registration. Some of these activities are detailed herebelow:

"The testimony makes it plain that Moore was the only person who conducted any business transactions for the respondent company and that any sales upon which the trademark registrations are based are sales conducted by Moore * * * In proceeding with the plan to do everything necessary to obtain trademark registrations, Moore acquired over a period of time a large number, between 55 and 60, of different articles. Most of these were purchased over the counter at different places, such as department stores, hardware stores, five and ten-cent stores, and drug stores, and a few were acquired otherwise. Most of the articles were then individually wrapped in paper, and a gummed label bearing the words 'Academy Award' placed on the wrapping. * * * This collection of articles was loaded into a sedan car; some were packed on the rear seat, some were put under the hood in the back, and some were tied on top. The car was driven to Secaucus, New Jersey, and the articles were personally delivered by Moore to Benjamin Doktor."

"Moore also stated that no sales of merchandise were made by anybody else since he handled all the sales personally as he was engaged '*to validate the trademarks and do everything necessary to come under the law in applying for them and securing them*'." (Emphasis added)

A comparison of the above-quoted language with the trial testimony of plaintiff's President David Slater relating how plaintiff's predecessor sought to establish early trademark rights will make it clear that the facts were the same in this case as in the Academy Award case:

"Q. You mentioned that Harwin purchased doughnuts from someone, boxed them and sold them under the name Mister Donut in August of 1955, is that correct?

A. That is correct, spelled both ways, Mr. and and Mister.

Q. You further stated that some of these sales took place in interstate commerce.

A. That is correct.

Q. Does that mean that some of these doughnuts were sold in a state other than Massachusetts?

A. That is correct.

Q. Were they sold in stores in a state other than Massachusetts? By that I mean a market or retail outlet.

A. No, they were sold to individuals outside of Massachusetts.

Q. How were these individuals apprised of the fact that these doughnuts were on sale?

MR. WOLF: Your Honor, I would object —

THE COURT: Overruled. This is very crucial.

THE WITNESS: The sales, to the best of my recollection, were arranged through the office of David Wolf. And they were transported by Mr. Winokur out of the state and sold.

BY MR. UTECHT:

Q. *Then these sales were contrived by Mr. Wolf, your trademark attorney, to establish your earliest rights —*

A. *Exactly right.*

Q. — to the word 'Mister Donut'?"
(R.T. 184, 195) (Emphasis added)

The law of the *Academy Award* decision has recently been affirmed by the District Court, S.D. New York in *Merry Hull & Co. v. Hi-Lin Co.*, 243 F. Supp 45 (July 1965).

From the above-quoted testimony of plaintiff's President it will be clear that plaintiff relied upon the contrived sales of doughnuts in August 1955 as establishing its earliest trademark rights. To determine whether or not plaintiff procured its registrations relied upon in this action by a false declaration of representation or by any false means so as to come under the sanctions of 15 U.S.C. 1120, it is necessary to examine plaintiff's registrations. These registrations are as follows:

1. MR. DONUT Registration No. 427,509
   Registered February 11, 1947 by Finis L. Ragsdale
   First use — February 14, 1946
   Covers Donuts.

2. MISTER DONUT Registration No. 683,370
   Registered August 11, 1959
   First Intrastate use — August 18, 1955
   First Interstate use — August 18, 1955
   Covers flour, filling and jellies for donuts, coffee and vegetable shortening.

3. MISTER DONUT Registration No. 668,784
   Registered October 28, 1958
   Covers Snackbar services
   First Intrastate use — August 16, 1955
   First Interstate use — August 16, 1955

4. Grotesque figure of animated donut
   Registration No. 673,298
   Registered January 27, 1959
   Covers Snackbar services
   First Intrastate use — August 16, 1955
   First Interstate use — August 16, 1955

It will be noted that of the three above-listed registrations, only the Ragsdale registration 427,509 covers doughnuts per se. Plaintiff, however, did not apply for such registration and accordingly the first sales of doughnuts referred to by plaintiff's President Slater would apply only to one or more of the other three registrations so far as a declaration of first use is concerned. It should be carefully noted that *none of these three registrations cover the sale of doughnuts per se*, rather, they cover snackbar services and donut ingredients. Thus, *plaintiff could not rely upon the August 1955 contrived sales of doughnuts for the August 1955 intrastate and interstate uses set forth in its three trademark registrations.*

The question then presented is upon what facts did plaintiff rely upon in making its declaration of first use when filing its trademark registrations?

Referring first to Registration No. 683,370 covering flour, filling and jellies for donuts, coffee and vegetable shortening, a first interstate use of August 18, 1955 was declared in applying for such registration. Yet, as evidenced by the testimony of plaintiff's President David Slater at the trial, plaintiff's first shop outside the state of Massachusetts (i.e. in New York) *was not even opened until* October 1957 (Finding 8, R. 578). Slater further testified that the coffee, doughnut flour, etc. would not have been purchased until a week or two prior to the opening of plaintiff's various stores. Specifically, Slater testified:

"Q. The first purchase by the first store would have been within a week or two of the opening of the store.

A. That is correct.

Q. How about the doughnut flour?

A. The same thing would apply to all the products. * * *

Q. All right. Harwin didn't arrange for any of these sales of coffee, flour, doughnut filling, jelly or vegetable shortening until just prior to the opening of that first store in November of '55.

A. Except for the sale of the doughnuts I described before. * * *

THE COURT: He is asking about the raw materials —

THE WITNESS: The raw materials, right.

That is correct." (R.T. 178, 179)

From the above testimony it will be clear that plaintiff was not entitled to claim a first interstate use for Registration No. 683,370 until just prior to the opening of the first shop outside Massachusetts, i.e. *just prior to October 1957.* Yet, the declared first interstate use of Registration No. 683,370 was *August 18, 1955.* Thus, plaintiff made a false representation of its first interstate use in obtaining Registration No. 683,370.

In fact, even the interstate date of August 16, 1955 was false since Slater testified at the trial that plaintiff's very first shop anyplace did not open until November 1955. Thus, if the sale of the donut ingredients did not take place until a week or two prior to November 1955 the declared intrastate use date of August 16, 1955 was also false.

Turning now to plaintiff's Registration Nos. 673,298 and 668,784 for snackbar services, plaintiff's first shop outside Massachusetts did not open until October 1957. Yet the first interstate use declared in both of these registrations is August 16, 1955. Accordingly, the first actual use of the trademarks covered by these registrations for snackbar services did not take place until October 1957. Plaintiff contended, however, that even though the first actual use did not take place until October 1957, newspaper advertising, radio commercials and roof signs showing plaintiff's mark would have taken place just prior to the opening of these shops (R.T. 199, 200). Since the first shop outside Massachusetts did not open until October 1957, however, such use did not occur until *just prior to October 1957, and hence the first interstate use date of August 16, 1955 was falsely declared.*

From the above discussion it will be clear that the facts in this case are on all-fours with the facts in the *Academy of Motion Picture Arts and Sciences* case. Plaintiff admittedly contrived the sale of doughnuts in interstate commerce in August 1955. This sale of doughnuts, even if bona fide, could not be relied upon as establishing a first interstate use of August 1955 for Registration No. 683,370 covering flour, filling and jellies for donuts, coffee and vegetable shortening, since the mere sale of doughnuts would not justify claiming a sale of flour, fillings and jellies for doughnuts, coffee and vegetable shortening. The first possible interstate use of the mark for flour, fillings and jellies for doughnuts, coffee and vegetable shortening was just prior to the opening of plaintiff's first shop outside Massachusetts in October 1957. Thus, plaintiff's predecessor made a false declaration of first interstate use in obtaining Registration No. 683,370.

Similarly, plaintiff clearly falsely represented a first interstate use of August 16, 1955 for its Registration Nos. 668,784 and 678,298, since no interstate use whatever could have occurred prior to just before

October 1957. Plaintiff, however, falsely declared a first interstate use of August 16, 1955 for both of these marks.

In this case, just as in the *Academy case*, defendants should be awarded their damages sustained in consequence of plaintiff's false declarations in accordance with 15 U.S.C. 1120. Such damages consisted of defendants' attorneys fees incurred in defending this lawsuit. Conclusion of Law 11 which holds plaintiff's Registrations Nos. 683,370; 673,298; and 668,784 were neither false nor fraudulent was clearly erroneous and that portion of the Judgment based thereon should be reversed, with the case being remanded to the District Court for accounting of defendants' damages.

Dated: March 13, 1968.

Respectfully Submitted

FULWIDER, PATTON, RIEBER, LEE & UTECHT

By FRANCIS A. UTECHT
Attorneys for Defendants-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Francis A. Utecht

No. 22116
No. 22116-A

IN THE

United States Court of Appeals for the Ninth Circuit

MISTER DONUT OF AMERICA, INC.,
Appellant,

vs.

MR. DONUT, INC., et al,
Appellees.

MR. DONUT, INC., et al,
Appellants,

vs.

MISTER DONUT OF AMERICA, INC.,
Appellee.

REPLY BRIEF OF DEFENDANTS MR. DONUT, INC., ET AL IN APPEAL NO. 22116A

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IN THE

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No. 22116
No. 22116-A

MISTER DONUT OF AMERICA, INC.,
Appellant,
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MR. DONUT, INC., et al,
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Appellee.

REPLY BRIEF OF DEFENDANTS MR. DONUT, INC., ET AL IN APPEAL NO. 22116A

This is a reply brief of defendants Mr. Donut, Inc., et al in Appeal No. 22116A and is directed solely to a reply to the portion of Plaintiff-Appellant's Brief commencing on Page 16 concerned with the District Court's failure to award defendants their attorneys' fees incurred in defending this action.

Finding of Fact 8 Provides A Sound Basis For Defendants' Contention Plaintiff's Marks Were Obtained By False Representations.

At Page 17 of its Brief, plaintiff argues that Finding 8 must be upset if defendants are to assert a claim for attorneys' fees. Actually, however, Finding 8 spells out plaintiff's false representations to the Patent Office in effecting registration of its MISTER DONUT marks. Thus, Finding 8 reads:

> "8. Plaintiff commenced using the mark MISTER DONUT about August 1955, when plaintiff was known as Harwin Management Corp. By October, 1957, the plaintiff had shops franchised under its mark MISTER DONUT in Massachusetts and New York. Shops were opened in Florida, Michigan and Virginia in 1958; Ohio, in 1960; Connecticut and Illinois, in 1961; Delaware, Georgia, Indiana, Pennsylvania and New Jersey, in 1962; Minnesota, in 1963; Nebraska, Maine, Kentucky, Ohio, Colorado, West Virginia and Wisconsin in 1964. In 1964 there were approximately one hundred twenty-five (125) Mister Donut shops in twenty (20) states However, it was not until 1966 that shops were actually opened in the State of California."

According to Finding of Fact 8, plaintiff commenced using the mark about August 1955 but it was *not until October 1957* that plaintiff had shops franchised in more than one state so as to have entered *interstate commerce.* Of course, federal registration is not available until the applicant is engaged in interstate commerce. Despite the fact that plaintiff did not in fact engage in interstate commerce until 1957, its registrations falsely represented a first interstate use of August 1955. It is defendants' position that this false representation justifies the award of damages to defendants under 15 USC 1120.

The Failure Of The District Court To Award Defendants Its Damages Under 15 USC 1120 Was Based Upon An Error In Law And Not An Error As To Fact.

As noted hereinabove, the District Court found as a matter of fact that plaintiff did not engage in interstate commerce until 1957. Plaintiff's applications for registrations, however, allege a first interstate use of August 1955. Such fact is apparent from the face of the registrations and cannot be contested. It will therefore be clear that a false date of August 1955 was represented by plaintiff in order to obtain its registrations. These facts should have caused the District Court to conclude that plaintiff obtained its registrations falsely. Instead, however, the District Court entered Conclusion of Law 11 holding plaintiff's registrations were neither false nor fraudulent. This conclusion was an obvious error in law. As such, therefore this Court can rule on such error without finding the District Court to have erred in a matter of fact.

The District Court's Error In Law Was Most Likely Induced By Plaintiff's Misapplication Of 15 USC 1115(b).

As set forth at Page 20 of Defendants' Brief the basis of defendants' request for attorneys' fees is 15 USC 1120.

According to 15 USC 1120:

> "Any person who shall procure registration in the Patent Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof."

Plaintiff, however, commencing at Page 19 of its Brief cites several authorities to support plaintiff's contention that defendants are not entitled to their attorneys' fees because plaintiff's registrations were not fraudulent. Plaintiff cited these same cases to the District Court in its Brief after Trial (R.T. 436). *It should be carefully noted that not a single one of these cases is directed to the recovery of attorneys' fees under the provisions of 15 USC 1120. Instead, these cases are each directed to cancellation proceedings based upon 15 USC 1064.* This section has no relation to the recovery of attorneys' fees under the provisions of 15 USC 1120. The pertinent portion of 15 USC 1064 giving rise to the cases cited by plaintiff is as follows:

> "Sec. 14 (15 U.S.C. 1064). Cancellation of registrations.
>
> A verified petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed by any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this Act, or under the Act of March 3, 1881, or the Act of February 20, 1905 * * *
>
> (c) at any time if the registered mark becomes the common descriptive name of an article or substance, or has been abandoned, or its registration was obtained fraudulently."

Referring to the above language it will be noted that cancellation is available where the registration was obtained *"fraudulently."* The sanctions of 15 USC 1120, however, are invokable where the mark is procured by a *"false* or fraudulent" declaration or representation. It will therefore be apparent that a lesser standard of bad faith is required to obtain damages under 15 USC 1120 than to obtain a cancellation under 15 USC 1064. Thus, none of the cases relied upon by plaintiff to establish it did not act fraudulently in obtaining its registrations is in point.

Plaintiff's Contention That Defendants Have Not Proved Damages Should Be Ignored.

Plaintiff at Page 21 of its Brief contends that defendants should not recover damages because there is "not a scintilla of evidence that the defendants were damaged." This statement conveniently overlooks the stipulation between the parties in open court that the issue of damages would be held in abeyance pending a determination as to liability (R.T. 26, 27). Accordingly, this contention of plaintiff should be summarily rejected by this Court.

Plaintiff Overlooks The Fact That Defendants Do Not Allege Fraud.

Plaintiff at Page 21 of its Brief contends defendants have improperly pleaded fraud since they have not complied with the requirements of Rule 9(b) F.R.C.P. This contention should also be summarily rejected by this Court because defendants are relying solely upon the *false* representations of plaintiff in obtaining its registrations under 15 USC 1120. Similarly, plaintiff's reference to the *Academy Award* case is not in order since the court in that case was dealing with a *fraudulently* obtained registration in a cancellation proceeding and not with an award of attorneys' fees under 15 USC 1120, as in the CA 2 *Academy Award* case cited at Page 21 of Defendants-Appellees' Brief.

Plaintiff's Reliance On The Fleischmann Case Is Misplaced.

Plaintiff's last argument appears at Page 23 of its Brief wherein it cites the *Fleischmann* case and the citations appearing therein as justifying the failure of the District Court in this case to award defendants its damages under 15 USC 1120. The *Fleischmann* case, however, involved an interpretation of 15 USC 1117, not 15 USC 1120. In *Fleischmann* a successful plaintiff sought attorneys fees from a deliberate trademark infringer in addition to defendant's profits, plaintiff's damages and costs. The Supreme Court held that because 15 USC 1117 of the Lanham Act detailed the remedies available to a successful plaintiff and attorneys fees are not spelled out as a remedy, such fees are not available.

In the present case 15 USC 1120 permits a prevailing defendant to recover his damages where he is sued under a falsely obtained mark. Defendants herein are seeking to recover attorneys fees as a measure of such damages. This was the exact factual situation in the aforementioned *Academy Award* case wherein the CA 2 held attorneys fees to be the proper measure of damages in a 15 USC 1120 proceeding.

This Court should rule as a matter of law defendants are entitled to their attorneys fees incurred in defending this action.

Dated: May 6, 1968.

Respectfully submitted,

FULWIDER, PATTON, RIEBER,
LEE & UTECHT

By Francis A. Utecht

Attorneys for Defendants-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frances A. Utecht

Nos. 22116 and 22116A

United States Court of Appeals
For the Ninth Circuit

MISTER DONUT OF AMERICA, INC.,
APPELLANT,

v.

MR. DONUT INC., ET AL.,
APPELLEES.

PLAINTIFF-APPELLANT'S BRIEF

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APPELLEE.

PLAINTIFF-APPELLANT'S COMBINED REPLY BRIEF IN 22116 AND BRIEF AS APPELLEE IN NO. 22116A

INTRODUCTION

This is a combined brief of the Mister Donut of America, Inc., hereafter referred to as plaintiff in response to the combined brief of Mr. Donut, Inc. et al., hereafter referred to as defendants, filed as appellee in Appeal No. 22116 and as appellant in Appeal No. 22116A, in accordance with the Order of this Court filed January 19, 1968.

This brief will deal with the argument of defendants in the order presented in their brief.*

Resolution of Plaintiff's Federal Cause in Favor of Defendants Does Not Render Moot the District Court's Erroneous Requirement That Actual Competition Exist as a Basis for Infringment, Since Plaintiff also has a State Cause of Action.

The plaintiff contended in its main brief that the district court seriously erred in holding that actual competition was a prerequisite to a finding of infringement. The defendants contend (D. Br. 3) that this argument of plaintiff was "illogical and unsound". Defendants claim that such a finding was irrelevant because (1) defendants established a defense under 15 U.S.C. 1115(b)5, and (2) its activities were outside the Lanham Act.

If either of the defenses relating to the Lanham Act referred to above are sound the issue of actual infringement and likelihood of confusion are still relevant since plaintiff's claim is premised on the common law as well as the Lanham Act. This error of the district court also cannot be ignored for the reasons stated in plaintiff's main brief.

Additionally, and of equal importance, the error of the district court is so glaring that it amounts to an indictment of the entire opinion. The district court totally misunderstood one of the simplest and most well established, basic fundamentals of trademark law. This fundamental requirement of trademark law is squarely and unequivocally set forth in the specific unambiguous language of 15 U.S.C.

* The following abbreviations will be used:

D. Br. refers to defendants-appellees brief.

P. Br. refers to plaintiff-appellants main brief.

Other abbreviations are the same as in other briefs.

1114(1) which states *inter alia*, that, "Any person who shall, without the consent of the registrant . . . use in commerce . . . colorable imitation of a registered mark in the connection with the sale . . . of any goods or services on or in connection with which such use is *likely to cause confusion*, or to cause mistake, or to deceive . . . shall be liable in a civil action." (Emphasis added). This statutory provision has been uniformly interpreted to require only a likelihood of confusion as a basis for a finding of infringement and as such it has attained a hornbook status in the decisional law. The district court's opinion is apparently the only one of perhaps thousands rendered to date which suggests that actual competition is a prerequisite to infringement. If the district court can make such a serious error relative to a basic fundamental principle of trademark law its entire opinion which includes observations on comparatively sophisticated principles involving Congressional purpose should be thoroughly reviewed.

California Common Law Is Relevant to These Proceedings Because It Protects the Broad Area of Natural Expansion of a First User of a Trademark and Precludes a Subsequent User's Local Use When Such Local Use Begins Under Conditions in Which the Subsequent User Knew or Should Have Known of the First User's Prior Adoption.

The defendant contends California law does not affect this case because it is the same as "the general law" and the general law protects an innocent party who adopts and uses a mark in good faith in an area remote from the prior user's area. (D. Br. 4, 5). Defendant relies upon *Tillman and Bendel v. California Packing Corp.*, 63 F. 2d. 498 (9th Cir. 1933). The *Tillman* case however does not "carte blanche" protect a subsequent user of a mark who adopts it without actual knowledge of a prior user's claim. *Tillman* specifically imposes a duty upon a second user to avoid designs inimical to the interests of a first user. And, adopting a mark in an area of natural expansion of the first user is such an inimical design. See, *Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 415 (1916).

Even if *Tillman* is construed as excusing an innocent subsequent user from the effect of California Business and Professional Code §14270, it does not follow that defendants can rely upon *Tillman*. The defendants are *not* innocent adopters of the Mr. Donut trademark since under California statutory and case law they had implied or constructive knowledge of plaintiff's prior rights which precludes a defense of innocence.

The leading relevant California cases which deal with the then famous marks Derringer, Stork Club and Brooks Bros. totally disregard actual knowledge as a controlling factor. The implication of these cases is that a defendant who ought to have known or investigated a prior right of another cannot escape the consequence of an infringement by claiming innocent adoption. See *Derringer* v. *Plat*, 29 Cal. 292 (1865); *Stork Restaurant* v. *Sahati*, 166 F. 2d 348 (9th Cir. 1948) and *Brooks Bros.* v. *Brooks Clothing of California*, 60 F. Supp. 442 (S.D. Cal. 1945). While in our main brief we suggested the rationale for such decision was based upon an interest in protecting the public from deceit and fraud (P. Br. 53), this requirement that a late user act prudently in selecting a mark appears to be an equally important rationale of particular application in California. See also, *Hall* v. *Halstrom*, 289 P. 668 (Cal. D.C. 1930), and cases cited.

The obligation to investigate prior rights of others is not limited to famous marks. California Civil Code § 19 provides:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry he might have learned such fact."

The cases within California where this section of the Code has been applied are legion and the situations where inquiry is called for are too many to enumerate. *Sterling v. Title Ins. & Trust Co.*, 53 Cal. App. 2d 736 (1942).

In applying this section of the Code, California courts have held that each case depends upon its own facts and circumstances. *West v. Great Western Power Co. of California*, 36 Cal. App. 2d 403 (1940); *Metcalf v. Drew*, 78 Cal. App. 2d 226 (1947). This latter case stated:

> " 'It may be premised that the means of knowledge must be available and of such a character that a prudent man might be expected to take advantage of them. The circumstances must be such that the inquiry becomes a duty and the failure to make it becomes a negligent omission.' There can be no doubt that this is . . . the true rule." *Id.* at 228. See also, *Zeller v. Mulligan*, 71 Cal. App. 617 (1925); *Hayward Lumber & Investment Co. v. Orondo Mines*, 34 Cal. App. 2d 697 (1939).

Can it be doubted that Jones, the defendant, should be charged with the duty to have made an inquiry as to the availability of Mr. Donut as a trademark. He had actual notice of circumstances which would have required any prudent man to inquire further. He was a franchisee of Winchell Donuts and therefore knew that donut businesses were being rapidly expanded via the franchise route. (R. 367 to 369). He also knew that franchised operations involved not only the interests of the public but also that of many small franchisees. Finally, as a businessman, he had more than a passing knowledge about the significance of trademarks and federal trademark registrations. (R. 393, 395, 396).

The "means of knowledge" . . .that "must be available" certainly were "of such a character that a prudent man might be expected to take advantage of them." There were no less than seven publicly available records in the Patent Office that Jones' attorney would have fallen over if Jones had been willing to spend \$25.00 to \$50.00 to see if Mr. Donut had been used by others. And every one of them would have told Jones that plaintiff had been using Mister Donut for years. Additionally, there were a number of issued state trademark registrations of plaintiff. Not only were these records available but their very purpose and existence, as any competent attorney could have told Jones in 1957, was to warn him of plaintiff's claim. That Jones was imprudent in not making a standard trademark search is an understatement. He was downright negligent for he certainly had a duty and obligation to the public in general to avoid a course of action that might create a source of confusion and deceit to them.

Surely in the light of these circumstances the "means of knowledge, *especially where it consists of public records* as is manifest in this case from the complaint itself is deemed in law to be knowledge. *Lady Washington Consol. Co.* v. *Wood*, 113 Cal. 482, 45 P. 809; *Consolidated R. & P. Co.* v. *Scarborough*, 216 Cal. 698, 16 P. 2d 268." *Wheaton* v. *Nolan*, 3 Cal. App. 2d 401, 403 (1934) (emphasis added).

Defendants' Reliance Upon the *Fairway* Case in Contending Defendants' Infringing Activities Are Not Amenable Under the Lanham Act Ignored the Factual Distinctions of That Case as Well as the Congressional

Purposes in Enacting the Lanham Act To Regulate All Commerce Within Its Control.

Pages 38 to 40 of plaintiff's main brief deal with defendants' contentions that *Fairway Foods, Inc.* v. *Fairway Markets, Inc.*, 227 F. 2d 193 (9th Cir. 1955) supports the district court's conclusion that defendants' activities do not affect interstate commerce and therefore they are not amenable under the Lanham Act. (D. Br. 6).

But additional comments may be helpful. The *Fairway* case is not in point since the defendant's intrastate activities there were not on a collision course with plaintiff's interstate activities, while in the instant case the parties have already collided. The defendants and the district court overlook the following important distinctions between *Fairway* and the present case:

1) In *Fairway* the plaintiff did not compete by operating or licensing stores in defendant's state of California. The present plaintiff does. (R.T. 56).

2) In *Fairway* the plaintiff did not have prospective franchisees or licensees refuse to take franchises because of defendant's use of a confusingly similar name. The present plaintiff already has been damaged by three such actual refusals. (R.T. 253, 256, 295 to 297, 309, Ex. 76, 93).

3) In *Fairway* the plaintiff was not actively soliciting franchisees and new store sites in the very same county in which defendant operated. The present plaintiff is actively seeking locations in defendants' Orange County in competition with defendants. (R.T. 74-81, Ex. 108, 113-116).

4) In *Fairway* the defendant did not admit to likelihood of confusion. Here defendants expressly admitted that likelihood of confusion between the two marks was probable. (R.T. 397).

5) In *Fairway* defendant operated a single store with no indications of intended expansion. Here defendants operate and franchise seven stores and assert an intention to substantially expand in competition with plaintiff. (D. Br. 10).

6) In *Fairway* defendant did not franchise others. Here defendants do franchise others. (R. 581).

7) In *Fairway* defendant operated a small grocery store catering entirely to local customers. Here defendants' customers include those who travel in interstate commerce. (R. 581).

The distinctions between this case and the *Fairway* case would appear to be as significant as those in *Drop Dead Co., Inc.* v. *S. C. Johnson & Son, Inc.*, 326 F. 2d 87 (9th Cir. 1963); See also, *Safeway Stores, Inc.* v. *Rudner*, 246 F. 2d 826 (9th Cir. 1957).

Although the defendants rely upon Finding of Fact 19 (R. 581) in support of their contentions that *Fairway* is in point, they also accepted the above enumerated distinctions since these distinctions are based on facts accepted by defendants. (Compare P. Br. 11 to 13 and D. Br. 2). It is hard to imagine that *Fairway* stands for the proposition that this Court is not empowered by the Lanham Act to control defendants' operations which include actively seeking franchisees in competition with plaintiff's franchising program in Orange County, where defendants' actions have already materially affected interstate commerce by causing prospective franchisees to refuse to do business with plaintiff. The damage and confusion to the public is bound to increase if not checked by this court since plaintiff has a number of operating franchisees in California and defendants have asserted, "In this regard, defendants fully intend to expand within the Southern California area but have held off such expansion pending the outcome of this lawsuit." (D. Br. 11).

UNDER THE LAWS OF CALIFORNIA, PUBLICATION FOR OPPOSITION BY THE UNITED STATES PATENT OFFICE OF PLAINTIFF'S "MISTER DONUT" MARK AND OTHER PUBLIC RECORDS CONSTITUTE CONSTRUCTIVE NOTICE OF PLAINTIFF'S CLAIM OF OWNERSHIP OF "MISTER DONUT" AND THEREFORE DEFENDANTS CANNOT AVAIL THEMSELVES OF DEFENSES UNDER 35 U.S.C. 1115(b).

Defendants' claim that the publication by the Patent Office on November 12, 1957 (several weeks before defendants started in business) of plaintiff's Registration 668,784 (Ex. 2) under the provisions of 15 U.S.C. 1062(a) was not constructive notice of its claim to MISTER DONUT, because such a publication was not one of "...the records designated in"...15 U.S.C. 1115(b) (D. Br. 9). Defendants' answer totally ignores the point made by plaintiff on page 30 of its main brief that 15 U.S.C. 1115(b) *does not enumerate any* publicly available documents which serve as constructive notice. It does on the other hand require defendants to establish two conditions if the defendants are to be permitted a defense of innocence. They are (1) that defendants' use was without knowledge of plaintiff's earlier use and (2) defendants' use was continuous from a date prior to the date of plaintiff's registration. Therefore even if we assume defendants used their mark continuously from a date prior to plaintiff's registration, the defendants still have to establish that their use was without knowledge of plaintiff's earlier use. And since 15 U.S.C. 1115(b) does not define knowledge, actual or constructive, such definition must be found elsewhere.

In our main brief we pointed out that a reading of other sections of the Lanham Act requires a holding that publications of the Patent Office should impose constructive notice of the facts published upon concerned parties (P. Br. 31, 32).

But we need not rely solely upon an interpretation of the Lanham Act, for if the Lanham Act is construed as not giving direction one way or the other with respect to what constitutes notice, actual or constructive, the void is clearly filled by existing California law.

Defendants had constructive knowledge of plaintiff's earlier use of MISTER DONUT under the Lanham Act for the same reasons that they had constructive knowledge under the laws of the State of California, Civil Code §19. (see infra p. 5). See also, California Business and Professional Code § 14400 relating to trade names (Appendix A).

Defendants assert that plaintiff's interpretations of the Lanham Act provisions are unsound because plaintiff failed to support its position with case authority (D. Br. 9, 10). But defendants overlook, pages 31 and 32 of plaintiff's main brief, which extensively cite case and commentator in direct support of these contentions.

CASES CITED BY DEFENDANTS DO NOT SUPPORT THEIR CLAIMS FOR EXCLUSIVE RIGHTS IN SOUTHERN CALIFORNIA FOR "MR. DONUT", BUT RATHER CLEARLY INDICATE THAT UNDER NO COMMON LAW CIRCUMSTANCES CAN DEFENDANTS ASSERT A TERRITORIAL RIGHT BEYOND THE FOUR MILE AREA SURROUNDING THE ONLY SHOP THEY HAD OPENED AT THE TIME PLAINTIFF'S REGISTRATION ISSUED. FURTHER THE AREA THAT DEFENDANT'S MIGHT OPERATE IN, IF A DEFENSE IS ESTABLISHED UNDER 15 U.S.C. 1115(b), IS TO BE DETERMINED UNDER THE LANHAM ACT AND NOT BY COMMON LAW CASES.

Defendants argue they should be permitted to use the mark MR. DONUT throughout the southern part of the State of California if this Court concludes that they adopted the mark without notice, constructive or actual, of the plaintiff's prior use. Defendants rely upon *Federal Glass Co. v. Loshin*, 224 F. 2d 100 (2nd Cir. 1955) and *Western Oil Refining Co. v. Jones*, 27 F. 2d. 205 (6th Cir. 1928). But neither of these cases is in point. These cases stand only for the proposition that a common law tradename will be afforded an exclusive territorial right in the specific area in which a *reputation has been established*. See also, *Hanover Milling Co. v. Metcalf, supra.* Neither *Federal Glass* nor *Western Oil* deal with 15 U.S.C. 1115(b) 5, or for that matter relates in any way to any Federal trademark law including the Lanham Act. The factual importance of statewide advertising and use as a basis for claiming rights throughout the state can be gauged from the opinion in the *Western Oil* case where the court noted, ". . .Such expansions as to a trade-name for gasoline, in view of modern transportation methods and the fact that many purchasers are travelers from a distance, would ordinarily embrace at least the entire state, in which there *had been a widespread advertisement and use* of the name in the major part of the state. *There had been such use by appellant of its name*, . . ." (emphasis added). Id at 205.

But defendants' Mr. Donut mark had only been used in a single shop catering to customers within a four mile radius in 1957 and therefore did not have any significant extraterritorial reputation then. Furthermore we are dealing with plaintiff's rights asserted under the Lanham Act and the defense posed by defendants is not a common law defense but a defense specifically defined by 15 U.S.C. 1115(b) 5.

As stated in Nims, *The Law of Unfair Competition and Trademarks*, Section 35A (1947) (cited in *Federal Glass*), "While the concept of goodwill has become less closely confined territorially, it still has boundaries, and even under modern doctrine it is necessary that there be evidence of its existence to warrant its protection. Its extent is a question of fact rather than of law." Since defendants confined their use of MR. DONUT before plaintiff's pending registrations issued to one store that catered to a clientele within a maximum radius of 4 miles, and since defendants were not in the franchising business until 1963 it simply does not make sense to proliferate an admittedly confusing situation to the public by allowing a defendant to expand its use after it has notice of plaintiff's registration, from a single shop to the entire southern half of the State of California.

Defendants do not distinguish *John R. Thompson Co.* v. *Holloway*, 366 F. 2d. 108 (5th Cir. 1966) cited by plaintiff in support of its contentions that, at best, plaintiff should be limited to a single shop (P. Br. 48), but do attempt to distinguish *Food Center, Inc.* v. *Food Fair Stores, Inc.*, 242 F. Supp. 785 (D. Mass. 1965). The basis for distinguishing the *Food Center* case is not sound for irrespective of whether there was prior litigation and whether defendants were entitled to use the mark with a descriptive prefix in a limited area, the issue there still came down to whether defendants could use a limited right in a mark as a lever to later expand its rights and preclude the prior out-of-state user from operating in other parts of the State of Massachusetts.

In addition to these cases which severely limited the rights of a local user to its area of actual use, there are a number of other relevant cases which illustrate the territorial limits afforded common law trademarks. *Jacobs* v. *Iodent Chemical Co.*, 41 F. 2d 637 (3rd Cir. 1930) held the senior user's rights in the mark IODENT were confined to the locality of Paterson, New Jersey, rather than the entire state since the senior party had only operated in the Paterson area. The court noted that the state boundaries are important only when the rights conferred are those conferred by the state. The court noted: "It follows that whether a first adopter of a trademark may be restricted to a territory less in area than that of a state is still an open question to be decided, we think, in the particular facts of the case."

In *Food Fair Stores, Inc. v. Square Deal Market Co., Inc.*, 206 F. 2d 482 (D.C. Cir. 1953) the court rejected a claim to a statewide right in a trademark. It stated:

> "Plaintiff-appellant's main contention on this appeal is that the District Court should at least have found plaintiff entitled to exclusive use of the name "Food Fair" in the Maryland counties adjacent to the District. It points out that it was indisputably first to make significant use of the name "Food Fair" in Maryland as a whole. And it claims that "significant use of a trade name within a state preempts the [whole] territory of that state for the prior user," whether or not the state includes some areas which are economically oriented to or integrated with urban centers in other states. It thus concludes that, because of its unquestioned priority in Baltimore, the District Court should have treated the disputed Maryland counties separately from the District of Columbia and awarded them to plaintiff. We think appellant's position is untenable. It is supported, to be sure, by a dictum of Mr. Justice Holmes in a concurring opinion *in Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916), to the effect that rights in trade names are statewide. But Mr. Justice Holmes' view has not found general acceptance, and we have no basis for thinking that it represents the law in the states bordering on the District of Columbia." Id at 484.

Katz Drug Co. v. *Katz,* 188 F. 2d 696 (8th Cir. 1951) held that a property right in a trade name is a right appurtenant to an established business or trade area in which the mark has been employed and that the sole exception rests on state statutes where the statute confers state-wide protection. In advancing this theory the court stated:

> "The appellant's contention that because its trade name has had secondary meaning in Kansas City, Missouri and should be held to have the same meaning throughout the state of Missouri and therefore in the St. Louis area, appears to be without merit. It is in conflict with the concept of property in a trade name being exclusively a right appurtenant to an established business or trade with which the mark is employed. The exception appears to be the cases that rest on state statutes conferring state-wide protection." See e.g. *ABC Stores, Inc.* v. *T. S. Richey Co.*, Tex. Com. App., 280 S. W. 177. Id at 699.

Thus, defendants' contention that "area" as used in 15 U.S.C. 1115(b) is to be construed as statewide finds no support in case law construing this federal statute, and to the extent that the common law is analogous the decisions are also at variance with defendants' position. See also Vandenburg, *Trademark Law and Procedure* (1959), pp. 51, 52.

Plaintiff Was Entitled To Rely Upon the Patent Office Record at a Time When Jean Ziebell's Use of "Mr. Donut" Was Enuring to the Benefit of the Ragsdale Estate.

The defendants have seriously misstated the arguments advanced by the plaintiff in support of Specification of Error 6. (D. Br. 11). The plaintiff did not concede, as suggested by the defendants, that plaintiff did not acquire goodwill with its purchase of the Ragsdale registration. Therefore defendants' lengthy argument that plaintiff's rights were acquired in gross is a misleading argument based upon a misrepresentation of plaintiff's position. What the plaintiff contends is simply that it bought a valid trademark since the trademark was being used by Jean Ziebell and generating goodwill. And as an innocent purchaser for value it is entitled to rely upon the Patent Office records which clearly showed that the mark and registration which it purchased for valuable consideration was owned by Ragsdale's estate. We admit that the situation would not be the same and that plaintiff would not have received good title to the Ragsdale mark if Ziebell had not been operating under the Mr. Donut mark. In such case the mark would obviously have been purchased in gross since it was no longer being used. But that is not the case as established by the defendants themselves.

The defendants also contend that the Mr. Donut mark was abandoned because Ragsdale apparently died within two years of the sale of his business in 1951 to Ziebell. But the plaintiff is not relying upon Ragsdale's non-use of the mark between 1951 and 1956. The goodwill which the plaintiff claims is transferred to it was the goodwill generated by Ziebell between 1951 and 1956.

Implicitly the defendants admit that had Ziebell been assigned the Ragsdale registration and the plaintiff thereafter obtained it from her in 1956 defendants could not seriously contend that the assignment was in gross and the registration void because she had been using Mr. Donut for years. Why, therefore, should the plaintiff be penalized because it relied upon the record in the Patent Office regarding the owner of the Ragsdale registration rather than conduct investigation outside of this record. Such contentions ring hollow in the light of the defendants' total failure to make even the most cursory examination of the records when it first adopted its infringing mark MR. DONUT. And regardless of whether or not the Ragsdale assignment was valid there remains the proposition of plaintiff, unanswered by defendants, that the mere recording of that assignment was the type of information or circumstances that would have put a prudent man on notice to investigate further. See California Civil Code §19.

The cases cited by the defendants on pages 12 to 14 of their brief stand for nothing more than the proposition that a trademark cannot be assigned unless there is a going business. The plaintiff does not disagree with this proposition, but such proposition is obviously not applicable since there was in fact a going business to be assigned.

DEFENDANTS DID NOT RESPOND TO THE ARGUMENTS MADE RESPECTING SPECIFICATION OF ERROR #10.

The only response to the plaintiff's Specification of Error #10 is its contention that this Court has held that the "incontestability" feature of 15 U.S.C. 1065 is defensive and not offensive, citing *Tillamook County Creamery Association* v. *Tillamook Cheese and Dairy Association*, 345 F.2d 158 (9th Cir. 1965). But the plaintiff doesn't contest the holding of *Tillamook* and in fact cited it on page 56 of its main brief. On that page the plaintiff pointed out that we need not consider that aspect of the Lanham Act. Specification of Error #10 was primarily an equitable argument which was dealt with from page 49 to page 51 of the plaintiff's main brief. The defendants do not answer any of the issues raised on those pages.

DEFENDANTS ARE NOT ENTITLED TO ATTORNEY'S FEES BECAUSE THEY FAILED TO PROVE THE DATES ALLEGED BY PLAINTIFF IN ITS REGISTRATION WERE FALSE, AND EVEN IF FALSE THEY FAILED TO PROVE THE DATES ALLEGED WERE

Fraudulently Asserted For Purposes Of Obtaining A Registration. Further, Even If Plaintiff Was Fraudulent In Obtaining Its Registration Defendants Have Not Proved Damages.

In their cross appeal defendants demand attorneys' fees under 15 U.S.C. 1120, citing as "the leading case" *Academy Award Products, Inc.* v. *Bulova Watch Co., Inc.*, 233 F.2d 449 (2nd Cir. 1956). They further state on page 23 of the brief that the *Academy Award* case was "affirmed by the District Court, S. D. New York in *Merry Hull & Co.* v. *Hi-Lin Co.*, 243 F. Supp. 45 (July 1965)." The defendants' claims for attorneys fees totally ignore the district court's specific Findings of Facts No. 8 and No. 25 which respectively reads in part, "Plaintiff commenced using the mark Mister Donut about August 1955, when plaintiff was known as Harwin Management Corp. . ." (R. 578), and, "25. Any conclusion of law hereinafter recited which should be deemed a finding of fact is hereby adopted as such." (R. 582) Defendants also ignore Conclusion of Law No. 9 which reads, "9. Plaintiff is not guilty of unclean hands". (R. 583).

Unless these findings are upset there is absolutely no basis upon which defendants can assert a claim for attorneys fees. The defendants have attempted to upset these findings by citing very limited passages of the testimony of David Slater. But the trial court's findings were obviously not based upon these segmented portions of testimony. The relevant testimony extends over at least 35 pages of the transcript (R. 180 to 215 inclusive). A fair interpretation of *all* the testimony elicited from David Slater shows he testified to his understanding of the facts, since he was not working for plaintiff in 1955. He stated that the first use and first use in interstate commerce of the mark Mister Donut consisted of special shipments and sales made by Harry Winokur before the setting up of the first Mister Donut shop. He also testified that plaintiff's first shop catered to customers some of whom arrived in out of state cars. David Slater also testified that Harry Winokur made preparations as early as January 1955 for the opening of the first Mister Donut shop and took every possible precaution to assure himself of ownership of the mark MISTER DONUT. These preparations included transportation and sale in interstate commerce of donuts under the trademark MISTER DONUT in August 1955, the date alleged in the registrations as the dates of first use. He also testified that he made extensive use of the mark in connection with the preparation of the operations of plaintiff's snack bar in August 1955. Since the district court's findings of fact were based upon substantial testimony such findings should not be overturned unless clearly erroneous. And merely citing limited portions of this testimony which is devoid of any permissible inferences of fraudulent intent falls far short of showing the district court was clearly erroneous.

Section 45 of the Trademark Act of 1946 (15 U.S.C. 1127) defines "use in commerce" as:

> "For the purposes of this Act a mark shall be deemed to be used in commerce (a) on the goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and the goods are sold or transported in commerce and (b) on services when it is used or displayed in the sale or advertising of services and services are rendered in commerce, or the services are rendered in more than one State or in this and a foreign country and the person rendering the services is engaged in commerce in connection therewith."

The actual use of the mark MISTER DONUT made by the plaintiff in August 1955 comes within the definition set forth above. And in any event the nature of plaintiff's use in August 1955 is certainly not so far afield from the quoted definition of use in commerce as to amount to fraud.

This Court has already rejected contentions such as made by defendants in *Drop Dead Co., Inc. v. S. C. Johnson & Son, Inc., supra,* where appellants unsuccessfully argued that a single shipment of goods was a "colorable" use rather than an "actual" use. The Court stated:

> Appellants attempt (Op. Br. 46 ff) to avoid this conclusion by the contention that the sending of the item for such use was not an *actual* use but only a *colorable* use, in that it was only transported to obtain the trademark. Appellants try to show that it is "plainly apparent from the context [of the trademark statutes]" (15 U.S.C. §1127) that colorable use was to be distinguished from actual use. However, we think that the statute makes no such distinction. Its language is clear. If the label is affixed and the goods transported in commerce, the mark is "used in commerce." Id at 93.

The defendant has failed to show that plaintiff's purpose in setting forth the August 1955 dates was fraudulent or that it willfully and falsely asserted these dates for the purpose of wrongfully obtaining a registration. *Universal Overall Co. v. Stonecutter Mills Corp.*, 145 U.S. P.Q. 567 (P.O. T.T. & App. Bd. 1965). This defense requires that the defendants show that "the mark was obtained fraudulently". Thus even if the alleged dates of August, 1955 were incorrect it does not follow that the dates set forth were fraudulent or that the registration was obtained fraudulently. *Cf. Land O'Lakes Creameries v.*

Oconomowoc Canning Co., 221 F. Supp. 576 (E.D. Wisc. 1963). A mere misstatement of a date of first use in a trademark registration cannot in and of itself afford a basis for cancellation of the registration. *Walworth Co.* v. *Moore Drop Forging Co.*, 19 F.2nd 496 (C.C.A. 1, 1927); *National Tuberculosis Association* v. *Summit County Tuberculosis & Health Assn., et al.* 101 U.S.P.Q. 387 (D.C. Ohio 1954); *Philco Corp.* v. *Cary Corp.*, 123 U.S.P.Q. 420 P.O.T.T. & App. Bd. 1959). A substantially similar problem was presented in *TraveLodge Corp.* v. *Siragusa*, 228 F. Supp. 238, (N.D. Ala. 1964). The court stated:

> "(4) Defendants further seek to avoid the effect of the registration of plaintiff's mark under the Lanham Act on the ground that such registration was fraudulently obtained and in their counterclaim pray for the cancellation of such mark. Section 1115(b) (1) unquestionably provides that the registration shall not be conclusive evidence of exclusive right to use the mark if 'the registration or the incontestable right to use the mark was obtained fraudulently.' Likewise, Section 1119 grants this court power to order cancellation of the registration and Section 1064 includes as grounds for such cancellation: '[I]ts registration was obtained fraudulently.' Defendants argue that the affidavit of Scott King that the service mark was first used in May of 1939 as contained in the application for registration is false in that the evidence shows that the opening date of the first TraveLodge Motel was in 1940 and that the mark was not being used in commerce. Plaintiff's witness, Scott King, admitted that the first TraveLodge was not opened until 1940. He testified, however, that his statement in the application that the name was first used in May of 1939 was based on the fact that he

was at that time in the construction business and actively seeking persons from various states who might wish to construct motels and in that connection he was discussing with others having a potential interest the use of the name 'TraveLodge'. Whether or not such use of the name constituted use of the mark under the Lanham Act is unnecessary for decision for two reasons. *First, there is no evidence of permissible inference that the facts stated in the affidavit, even if false, were fraudulent.* Defendants assumed, but did not discharge, the burden of proving such fraud, not just some misstatement in the affidavit. *Seaporcel Motels, Inc.* v. *American Siporck Corp.*, 125 U.S.P.Q. 664; *Philco Corp.* v. *Clary Corp.*, 123 U.S.P.Q. 420. *National Tuberculosis Ass'n.* v. *Summit County Tuberculosis & Health Ass'n.*, 122 F. Supp. 654, N.D. Ohio 1954." (Emphasis added) Id at 242.

The defendants are not entitled to recover anything even if plaintiff obtained fraudulent registrations because there is not a scintilla of evidence that the defendants were damaged as a result of such registrations. Plaintiff, irrespective of the registrations which the defendants claim were fraudulently asserted, had a cause of action against defendants based upon its common law rights and upon its Ragsdale registration. Both of these rights were asserted below, and are being asserted in this Court. Consequently the attorney's fees claimed also have been spent to defend a cause of action which defendants have not asserted is fraudulently founded. And since defendants would have had to defend these claims in any event it has not established damages.

Furthermore, the defendants have improperly pleaded their charge of fraud since they have not complied with the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *Seaporcel Motels, Inc. v. American Siporek Corp.*, 125 U.S.P.Q. 664, (P.O.T.T. & App. Bd. 1960). Had the defendants seriously believed that the plaintiff had willfully falsified dates in representations to the Patent Office for the purpose of procuring registrations, the defendants could have explored the issue more completely in depositions long prior to the trial and could have properly pleaded the issue. The defendants were informed early in these proceedings by way of Plaintiff's Answer to Defendants Interrogatory No. 6 that plaintiff's counsel David Wolf and Harry Winokur were those having the most knowledge about the circumstances of first use and not David Slater who was not employed by plaintiff in 1955. No attempt was made by the defendants to depose either of these individuals nor was any attempt made to list either of these individuals in the Pre-Trial Order as possible defendants' witnesses.

Not only did defendants fail to plead their charge of fraud but they have waived whatever claims or rights they might have even if plaintiff's past actions were improper. In Defendants' Brief After Trial defendants withdrew their demands for cancellation of plaintiff's registrations (R. 498, 499). Such withdrawal should operate as a waiver or estoppel to any claim for attorney's fees based upon a charge that plaintiff has improperly obtained such registrations.

The defendants' attempts to analogize the *Academy* case with the facts of the present case are improper. The *Academy* case involved an *obvious* fraud situation. There the registrant was not in business, had no intentions of going into business and made clear and palpable fraudulent representations to the Patent Office solely for the purpose of obtaining a series of registrations. The following passage in the eleven page opinion of the trademark cancellation proceedings, *Academy* v. *Academy Award Products, Inc.*, 89 U.S.P.Q. 451 (P.O. Ex. in Ch. 1951), illustrates the purely fraudulent nature of the registrant's activities:

> "...The entire transaction in so far as it relates to the use of a trade mark on goods in trade, can not be considered bona fide and such as to create ownership of the trade mark in respondent. Respondent was not engaged in any business (other than the spurious one of trying to get trade marks without any business) and the purported use of the trade mark on goods in trade can only be characterized as a mere pretense and subterfuge, carried out for the sole purpose of laying a basis for securing the trade mark registrations...
>
> "...All of the registrations were also obtained fraudulently in view of the other numerous false statements made in the applications..." *Id* at 460, 461.

In the present case it is clear that even if the dates alleged in plaintiff's registrations were incorrect, the registration would have issued for plaintiff's trademark was in continuous interstate use at the time of registration.

The recent Supreme Court case of *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967) is relevant. In that case the Supreme Court held that an award of attorney fees was not proper under Section 35 of the Lanham Act as compensation for infringement. In reaching this decision the Court noted that "...our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796), and adhered to it in later decisions. See, e.g. *Hau-*

enstein v. *Lynham*, 100 U.S. 483, (1880); *Stewart* v. *Sonneborn*, 98 U.S. 187 (1878); *Oelrichs* v. *Spain*, 15 Wall. 211 (1872); *Day* v. *Woodworth*, 13 How. 363 (1851)." The thrust of the *Fleishmann* case is that in the absence of specific statutory language no attorney's fees should be awarded.

CONCLUSION

For the foregoing reasons plaintiff respectfully requests that the judgment of the district court be reversed.
Dated: April 15, 1968

Respectfully submitted,
WOLF, GREENFIELD & HIEKEN
by (s) DAVID WOLF
LEONARD H. MONROE

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID WOLF,
Attorney

APPENDIX A

California Business & Professional Code § 14400:

Any person who has adopted and used a tradename, whether within or beyond the limits of this State is its original owner.

NO. 22118-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF

PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

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PETITIONER'S OPENING BRIEF

JURISDICTION

The within petition is for review of a portion of a decision of the Tax Court of the United States holding monies received by petitioner as deposits under certain post-1961 "Pre-Need Funeral Agreements" to be taxable as income to petitioner upon receipt and not to be exempted as holdings in trust. The Tax Court also determined that all payments under earlier similar agreements in a slightly different form were trust holdings only and were not taxable as income to petitioner; respondent initially appealed from this but subsequently abandoned such appeal and that portion of the decision below has become final.

Jurisdiction in the Tax Court was founded on 26 U.S.C. §§ 7442 and 6213. Jurisdiction in this Court upon the within petition for review is founded on 26 U.S.C. §7482.

STATEMENT OF THE CASE

Petitioner sets forth below the facts of the case, based upon the Stipulation of Facts agreed to at the Tax Court hearing, and confirmed by that Court, and upon the oral and documentary evidence introduced at the said Tax Court hearing:

1. The petitioner, Angelus Funeral Home, is a California corporation, with its principal place of business at Los Angeles, California (T.R., Vol. I, 1/ p. 23, Stipulation of Facts, Par. 1).

2. For the taxable year ending December 31, 1954, through the year ending December 31, 1961, petitioner filed timely corporate income tax returns with the District Director of Internal Revenue, at Los Angeles, California (T.R., Vol. I, p. 23, Stipulation of Facts, Par. 2).

3. Petitioner's business consists principally of providing funeral and burial services (T.R., Vol. I, pp. 23, 24, Stipulation of Facts, Par. 7).

4. As a part of its business during the years 1959, 1960, and 1961, petitioner entered into written contracts with

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1/ Signifying, Transcript of the Record, Volume I.

individuals, which said contracts were delineated as "Pre-Need Funeral Plan Agreements". Said Agreements provided in advance for the rendition of specified funeral services upon the death of the party contracting with Angelus (T. R., Vol. I, pp. 23, 24, Stipulation of Facts, Par. 8).

5. Petitioner has been writing similar funeral contracts since 1954 (T. R., Vol. I, pp. 23, 24, Stipulation of Facts, Par. 9).

6. As amounts were collected by petitioner on the contracts during 1959, 1960 and 1961, petitioner in its bookkeeping method would debit a special clearing account (a checking account at the Bank of America) on its books and credit a liability account designated as "Pre-Arranged Funeral Liability" (T. R., Vol. I, pp. 23, 24, Stipulation of Facts, Par. 10).

7. During the years 1959, 1960, and 1961, it was petitioner's normal practice to deposit amounts collected on the contracts in a special clearing (checking) account (T. R., Vol. I, pp. 23, 25, Stipulation of Facts, Par. 12).

8. Petitioner did not reflect the amounts collected on the contracts as income in the year the payments were received (T. R., Vol. I, pp. 23, 25, Stipulation of Facts, Par. 13).

9. Petitioner returned income from the contracts only when it was required to fulfill its contractual obligations, namely, to provide funeral and burial services upon the death of the particular individual (T. R., Vol. I, pp. 23, 25, Stipulation of Facts, Par. 14).

10. Petitioner would reflect the income on its books by

debiting the liability account delineated as "Pre-Arranged Funeral Liability", and crediting earned income (T. R., Vol. I, pp. 23, 25, Stipulation of Facts, Par. 15).

11. During the years 1959, 1960, and 1961, aside from the special clearing (checking) account, there were four savings accounts used in conjunction with the collections on the contracts (T. R., Vol. I, pp. 23, 25, Stipulation of Facts, Par. 16).

12. The savings accounts were designated as trustee accounts (T. R., Vol. I, pp. 23, 26, Stipulation of Facts, Par. 17).

13. The amounts originally deposited in the special clearing account were periodically transferred from said account into one of the four trustee savings accounts (T. R., Vol. I, pp. 23, 26, Stipulation of Facts, Par. 19).

14. The written contract utilized by petitioner up to approximately September, 1961, [2/] provided that all sums collected by Angelus under the contract shall be deposited in a bank, trust company, or savings and loan institution, and that Angelus shall not thereafter withdraw any sums unless there was proof of death of the contracting party presented to Angelus, at which time Angelus could apply the sums collected toward the cost of funeral services which Angelus had thereupon rendered (Petitioner's Tax Court Exhibit No. 10; Tax Court Finding of Fact, T. R., Vol. I, p. 31).

2/ These earlier agreements were all in the form expressed and represented by Petitioner's Exhibit No. 10; these agreements are hereinafter referred to as "pre-1961 agreements" or as the "pre-1961 agreement-form".

15. In approximately September, 1961, petitioner changed its form of contract, which said form had the same provisions as its earlier contract, with only one exception: The new contract [3/] provided that, in consideration of Angelus paying to the contracting party ten per cent (10%) of all of the sums paid in by said contracting party within each calendar year, Angelus was given the right to utilize the sums paid in for the limited purpose of the acquisition and/or development of real property or for making capital improvements in its then-existing mortuary facilities (Petitioner's Tax Court Exhibit 11; Testimony of Mr. Hill, Reporter's Transcript, p. 50, line 24 to p. 51, line 12).

16. During the months of September, October, November, and December of 1961, even though petitioner had the right under the contract to utilize the funds for certain limited purposes, petitioner did not, in fact, make any withdrawals of the funds for any purpose other than a transfer of funds to which petitioner had become entitled as a result of having performed services under the contracts (T. R., Vol. I, pp. 23, 26, Stipulation of Facts, Par. 23; Joint Tax Court Exhibit 9-I, Schedule IV).

17. At the end of the taxable years in question, 1959, 1960, and 1961, petitioner had on deposit in the trustee accounts a sum in excess of what was shown on its books as the amount of the Pre-Need Liability under its contracts (Joint Tax Court Exhibit

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3/ The form for these later agreements is embodied in Petitioner's Exhibit No. 11; the form of these agreements is hereinafter referred to as "the 1961 agreement-form".

9-I, Schedule I).

18. At no time during the taxable years 1959, 1960, and 1961 did petitioner withdraw any funds from the trustee pre-need accounts other than funds to which petitioner had become entitled as the result of having performed services (Testimony of Mr. DeMatoff, Reporter's Transcript, p. 65, line 22 to p. 66, line 4).

19. Both of the contracts utilized by petitioner gave petitioner, in consideration of the collection and conservation of the funds, the right to the interest earned on the sums on deposit in the savings and loan institutions, and this income was reported in petitioner's tax returns (Petitioner's Tax Court Exhibits 10 and 11; T. R., Vol. I, pp. 23, 26, Stipulation of Facts, Par. 22).

20. Both of the contracts required that "all amounts paid . . . shall be held by Angelus in irrevocable trust" (Petitioner's Tax Court Exhibits 10 and 11).

The Tax Court Decision

The Commissioner of Internal Revenue had previously made a determination that all sums collected under the "Pre-Need" contracts for all years in question were taxable to taxpayer in the year received. It was from this determination, and the resulting deficiencies, that the taxpayer filed its petition in the Tax Court.

The Tax Court found that under the pre-September, 1961 form of contract, petitioner "was a true trustee" and had no right

to use the money paid in by the pre-need applicants (T. R., Vol. I, Tax Court Decision, pp. 28, 36). Its judgment in this regard was that none of said sums collected pursuant to said contract were taxable to petitioner upon their receipt. Petitioner in this Court does not complain concerning that part of the Court's opinion. The Commissioner on June 1, 1967 filed a Petition for Review from that part of the Tax Court's decision (T. R., Vol. I, General Docket p. 3) but subsequently filed its written abandonment of that appeal as is reflected by the Records of this Court (See the footnote appearing on the cover page of the Transcript of Record, Vol. I). That part of said judgment has now become final.

The Tax Court, however, reached a conclusion that the change in the form of the contract which petitioner began using in September, 1961, because it gave to Angelus the right to use the funds for the limited purposes set forth in the contract, and heretofore described, "destroyed" the trust arrangement between the parties and thus made the sums taxable as they were received by the taxpayer. It is from this portion of the Tax Court's decision that petitioner filed its Petition for Review (T. R. Vol. I, p. 52).

SPECIFICATION OF ERRORS RELIED UPON

Upon this petition for review petitioner contends:

(1) That the right of limited use of the funds received by petitioner under the 1961 agreement-forms did not destroy the trust relationship between petitioner and its applicants; and,

(2) That the payments received under the 1961 agreement-forms are not income to petitioner because petitioner did not have unrestricted and unfettered use of such funds, but had only a very limited use which was secondary to the benefit created for the beneficiaries of the trust.

ARGUMENT

I

THE PORTION OF THE JUDGMENT BELOW HOLDING ALL FUNDS RECEIVED UNDER THE PRE-1961 AGREEMENT-FORMS WERE HOLDINGS IN TRUST AND WERE NOT TAXABLE AS INCOME TO PETITIONER IS FINAL AND BINDING AS THE LAW OF THE CASE AND UNDER RES JUDICATA.

As related in the Statement of the Case the Tax Court unequivocally -- and rightly -- held that all payments paid petitioner under the pre-1961 agreement-forms (as embodied in Petitioner's Exhibit 10) constituted payments <u>in trust</u> only and were <u>not</u> taxable to petitioner upon receipt as income. By the express terms of all such agreements all of the deposits were required to be held by petitioner "<u>in irrevocable trust</u>" and were required to be deposited in a bank or savings and loan association account to be held and maintained therein (unless earlier withdrawn by the applicant) until the applicant's death. Upon the applicant's death (but then only <u>if</u> the applicant did not die outside of Los Angeles County where funeral services by petitioner would not be "practicable" and, in actual practice, only if the relatives of the applicant did not otherwise

request a transfer of the deposited funds to another funeral director to perform the funeral services) the petitioner was authorized and required to apply the deposited funds to furnishing a casket and funeral service reasonably appropriate to the amount of the applicant's funds on deposit at his death. 4/

Clearly these deposited funds were characterized by contingency, and were held in trust, and because of these circumstances were not taxable as income to petitioner at the time of their receipt. The Tax Court's decision to this effect is supported not only by its own two cited prior decisions in The Seven-Up Company v. C. I. R. (1950), 14 T. C. 965, acq. 1950-2 C. B. 4, and Broadcast Measurement Bureau, Inc. v. C. I. R. (1951), 16 T. C. 988, but is confirmed as well by this Court's decision in closely parallel premises in Portland Cremation Association v. C. I. R. (C. A. 9, 1929),

4/ The contingency that the applicant might withdraw any or all of his deposits at any time prior to death and the contingency that the relatives after death might request a transfer of the funds to another funeral director to perform the funeral arose not from the face of the agreements but from the uniform conduct and practice of petitioner, according to the uncontested testimony, to always honor any such requests (Rep. Tr. pp. 23-25). These consistent acts by petitioner limiting the scope of its interests and rights under the agreements are particularly controlling as to its powers because the agreements would in any event be construed most strictly against its interests and powers because originating under its authorship.

The agreements called only for small original deposits (Rep. Tr. p. 24, lines 1-3, and p. 22, lines 5-15) and for small, merely voluntary periodic payments thereafter "at the will of the depositor" (Rep. Tr. p. 31, line 17). The down payment called for in the sample introduced as Petr's Ex. 10 was $2.00, and the expected monthly payments thereunder were only to be $5.00. Additionally, the agreements specifically and particularly provided that petitioner should possess "[no] right to sue for or otherwise demand payment of any sum . . . which is not voluntarily paid" (See par. 3 of Petr's Ex. 11 and cf. par. 3 of Petr's Ex. 10; see also the testimony above as to the applicant's right even to withdraw sums already paid).

31 F.2d 843, and by abundant additional authority as well. (See: Metairie Cemetery Association v. United States (C. A. 5, 1960), 282 F.2d 225, 229-230; C. I. R. v. Cedar Park Cemetery Association (C. A. 7, 1950), 183 F.2d 533, 556-557; c.f. Clinton Hotel Realty Corp. v. C. I. R. (C. A. 5, 1942), 128 F.2d 968-970; C. I. R. v. Riss (C. A. 8, 1967), 374 F.2d 161, 171-172; Harcum v. United States (E. D. Va., 1958), 164 F. Supp. 650, 651; Warren Service Corp. v. C. I. R. (C. A. 2, 1940), 110 F.2d 723, 724-725; Mantell v. C. I. R. (1952), 17 T. C. 1143, 1148-1149.)

Moreover, as related in the Statement of the Case although the respondent Commissioner initially appealed from the portion of the Tax Court's judgment here concerned he subsequently abandoned and dismissed that appeal. In consequence, it is settled law that that portion of the decision and judgment below is now final and res judicata. (Alexander v. Cosden Pipe Line Co. (1934), 290 U.S. 484, 487; Bolles v. Outing Company (1899), 175 U.S. 262, 268; United States v. Hickey (1873), 17 Wall. 9; Gannon v. American Airlines, Inc. (C.A. 10, 1958), 251 F.2d 476, 482.) By abandoning his appeal, the respondent "has acquiesced and become concluded by" the Tax Court's judgment in the respect here concerned and "cannot now be heard to complain". (Alexander v. Cosden Pipe Line Co., supra, at p. 487; Bolles v. Outing Company, supra, at p. 268.) By token of this, even were the judgment below otherwise debatable in any respect as to the pre-1961 deposit payments, that holding is fixed now as "res judicata" (Beneneson v. United States (C. A. 2, 1967), 385 F.2d 26, 30 f.n. 7; Cochran v. M & M

Transportation Co. (C. A. 1, 1940), 110 F.2d 519, 523; 13 Cyc. Fed. Proc. 29-30) and as "the law of the case" (5 C. J. S. 666). That portion of the decision "is not before the appellate court for review" (Id., at p. 729).

II

THE MERE CHANGE INTRODUCED BY THE 1961 AGREEMENT-FORM PERMITTING INVESTMENT IN TRUST OF DEPOSIT MONIES IN MORTUARY IMPROVEMENTS OR REAL PROPERTY OF PETITIONER IN LIEU OF DEPOSIT ONLY IN BANKS DID NOT DESTROY THE TRUST CHARACTER OF SUCH DEPOSITS NOR MAKE THE SAME TAXABLE AS INCOME TO PETITIONER.

A. Upon Principle the Mere Grant of the Limited Investment Power as to Deposit Moneys Expressed in the 1961 Agreement-Forms Did Not Destroy the Trust Character of Moneys Placed on Deposit Thereunder Nor Make Such Deposits Taxable to Petitioner as Income.

It being established not merely in principle but by res judicata and as the law of the case that the deposits under the pre-1961 agreements were deposits in trust and characterized by contingency and not taxable as income to petitioner as and when received, the single change in the deposit agreements effected in September 1961 and uniformly expressed and reflected in the agreements thereafter (being in the words and form embodied in Petr's Ex. 11) could not and did not under law alter these consequences. The sole change introduced by the 1961 agreement-forms (Petr's

Ex. 11) was a grant to petitioner of a limited power as to deposited funds to invest the same in trust in "any capital improvement to then existing mortuary facilities belonging to ANGELUS" or in "the acquisition and improvement of real property" to be acquired, in lieu of being required to place such deposits solely in a bank or savings and loan association account (Petr's Ex. 11, par. 5). In return for such limited investment power petitioner agreed to pay a form of interest; as to each applicant petitioner agreed to pay such applicant each calendar year ten per cent of the amount paid in as a deposit by such applicant in such calendar year (Id., par. 6). Under the new agreement-form, as before, petitioner was still required in explicit terms to hold all deposited moneys at all times "in irrevocable trust" (Id., par. 4).

Upon principle it is entirely plain that such limited power of investment, made as it was expressly subordinate to a mandatory command that like all other powers of the trustee it be exercised only "in irrevocable trust", could not and did not destroy the trust character of the deposit moneys paid under the new 1961 agreement-form. By its very terms it was not a personal power or a power in fee, 5/ nor a power to appropriate property, but a limited, regularable

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5/ The Tax Court's citation of this Court's decision in Mutual Telephone Co. v. United States (C. A. 9, 1953), 204 F.2d 160, confirms the point made here. The permitted user of funds by the taxpayer involved there (deposit in taxpayer's employee pension fund) was a user in fee (albeit a limited one, as deposit could only be to the pension fund); had the permitted user involved there required only a continued deposit in abeyance, or in trust, as at bar, it is plain that in such event the ruling there would have been that taxable income had not accrued.

power in trust only. And not only was it so limited and constricted by its terms but at bar there could be no possible contention that it had been given a broader scope or sanction by the practice or conduct of the parties for by joint stipulation it was established below that petitioner had never in fact asserted the power or undertaken to exercise it in any way, shape or form (Stipulation of Facts, pars. 23 and 24, R. T. 26; Joint Tax Court Ex. 9-I, Schedule IV; see also the Tax Court's statement that "petitioner had not in fact acted under [such] option . . . at any time during 1961", as appears in T. R. 43 and in the reported opinion of the Tax Court, 47 T. C. 391, 398).

The Tax Court in holding against the petitioner fundamentally misconceived the limited, judicially-accountable trust character and scope of the investment power granted under the 1961 agreement-form. Asserting that such power authorized petitioner to invest deposited funds in "[the] acquisition and improvement of land . . . of sole benefit to the petitioner", the Tax Court erroneously characterized the nature of the granted power and the consequence of an exercise of it as follows:

> "It is patent that the title to such improvements and to such land would be in petitioner the same as title to any other of petitioner's properties, and that the values attaching thereto would be properly carried as an asset on petitioner's balance sheets and subject to claims of petitioner's general creditors. Such funds therefore would have lost all character of trust funds and all that

[would remain] would be a unilateral contractual obligation for petitioner to perform, or have performed, the funeral at applicant's death. . . . [In consequence, the moneys paid as deposits] were fully taxable to petitioner as they were received." (Opinion below, 47 T. C. 391, 398-399; T. R., Vol. I, pp. 42-44.)

The error of the Tax Court here is twofold.

Firstly, because the power to invest as expressed in the 1961 agreement-form was, like all other powers therein granted, made subject to an overriding, explicit command that it be exercised at all times "in irrevocable trust" only, the Tax Court errs in asserting that the granted investment power would or could be read in law to permit petitioner to invest the moneys deposited under the agreement-form in real property or improvements in petitioner's name alone and without placing upon the public record the rights and interests of the trust. The truth is that under California equitable law, which is the law which would control, trusts are apprehended and enforced jealously and with a liberal and protective regard for the interests and rights of beneficiaries. (4 Witkin, Summary of California Law, pp. 2890-2891; Coberly v. Superior Court (1965), 231 Cal. App. 2d 685; Estate of Miller (1964), 230 Cal. App. 2d 888; Estate of Moore (1961), 190 Cal. App. 2d 833; Estate of Cafferty (1966), 246 Cal. App. 2d 711.) If trust powers are abused or reasonable trust duties neglected, California makes available to any aggrieved beneficiary a formidable and effective

array of judicial remedies including proceedings to impose or declare equitable liens, to compel trust performance or to enjoin existing or threatened breaches, to compel an accounting and to remove and replace any misconducting trustee, if necessary, and for restitution or for compensatory or exemplary damages for any otherwise unredressed violations of duty. (4 Witkin, supra, pp. 2940-2942; Restatement of Trusts (2d) §§ 199 and 202; West v. Stainback (1952), 108 Cal. App. 2d 806, 815-816; Leitch v. Gay (1944), 64 Cal. App. 2d 16; St. James Church v. Superior Court (1955), 135 Cal. App. 2d 352, 357-362; Overell v. Overell (1926), 78 Cal. App. 251; Purdy v. Johnson (1917), 174 Cal. 521; Coberly v. Superior Court, supra; California Civil Code, §§ 863, 2251, 3422, 2283, 2237 and 2238; 31 Cal. Jur. 2d 240-242; 49 Cal. Jur. 2d 146-147 and 158.) Under California trust law the limited investment power here concerned would almost surely be read to require of petitioner that should it invest any of the trust moneys in any lands or improvements owned or acquired by it, it carefully segregate and account for any rights and interests thus established in the trust and that it place such rights and interests promptly on the public record. That is, petitioner could not hold any such lands or improvements simply in its own name alone, but would be required to vest the title to such properties pro tanto in the name of the trust, or of petitioner as trustee therefor.

Secondly, and beyond any doubt, no matter in what form or name title to any affected property or properties might be permitted or suffered to be held, if in truth and in fact any trust moneys

under the 1961 agreement-forms should be incorporated by petitioner into any lands or improvements, it is of the very essence of the trust character of such deposit moneys as defined and established under such agreements, that the applicant-depositors as trust beneficiaries could trace and reclaim any affected funds and could claim ownership of or a lien upon any such affected lands or improvements by token of equitable rights good not only against petitioner as trustee but against "his creditors, and anyone else except a bona fide purchaser." In any premises wherein trust moneys are incorporated into any identifiable properties, whether with or without right by the trustee, the trust beneficiary is granted in se "priority over the general creditors of the trustee" whenever he can trace and identify his trust interests therein, regardless of the name or form of any holding of title, absent the intervention of a bona fide purchaser for value. (4 Witkin, supra, pp. 2941-2942; Restatement of Trusts (2d) §202 at p. 445; Gilbert v. Sleeper (1886), 71 Cal. 290, 293; 49 Cal. Jur. 2d 321, et seq.)

Another way to evaluate and weigh the trust character of the limited power of investment granted at bar is to compare it to a grant to a trustee of a plenary and total power to lend trust moneys to himself for any (unlimited) use or purpose. Surely the granted power at bar is a far lesser authority than a plenary authority to lend money to oneself for any use or purpose. Yet under well established trust law even a grant to a trustee of total power to lend trust moneys to himself is not destructive of the trust character of a genuine trust instrument or deed (Restatement of Trusts

(2d) §170, comment (t), p. 372; 4 Bogert, Trusts and Trustees (2d ed.) 497-498; Nossaman, Trust Administration and Taxation (2d ed.) 444, although it will call for "strict construction" of any such power and for stern judicial scrutiny and review of the exercise thereof and the imposition of any necessary safeguards to protect and secure the legitimate interests and rights of any affected beneficiaries. (Bogert, Hand Book of the Law of Trusts (4th ed.) 253; Restatement, supra, p. 372; Nossaman, supra, p. 444.) So far from freeing the trustee from trust answerability or limitations, the grant of a power to lend trust properties to himself (or of any other power otherwise creating conflicts of interest or opening opportunities for abuse) calls forth the protections of equity and requires per se that the trustee under such powers be held to the fullest good faith in every respect. In such premises a trustee will be deemed to "violate his duty to the beneficiary . . . if he acts in bad faith no matter how broad may be the provisions." (Restatement, supra, p. 372.) His every act will be reviewed with the closest scrutiny, and there will be imposed the requirement "of uberrima fides." (Nossaman, supra, p. 444).

B. Strong Precedents Upon Closely Parallel Trust Facts Confirm That the Deposits Under the 1961 Agreement-Forms Were Holdings in Trust and Were Not Taxable as Income to Petitioner.

Strong precedents in trust law confirm the trust and non-taxable character of the deposit moneys under the 1961 agreement-

form despite the limited power of investment granted thereunder. These decisions explicitly confirm that the mere circumstance that the 1961 agreements do not expressly require that trust funds, and any investments thereof, be segregated and held separate at all times from the general properties of the trustee, in word and form as well as in substance, is not a basis for denying the enforceable trust vitality of, and the non-taxable nature of, money deposits intended in truth and substance to be held in trust.

Primary among the authorities here in point is the decision of this Court in Portland Cremation Association v. C. I. R. (C. A. 9, 1929), 31 F.2d 843. In that decision this Court held that moneys deposited with the taxpayer mortuary subject to a substantive oral or "inferred" trust that the moneys be held and used solely for the permanent maintenance and care of cremation urns and niches, were entitled to the rights and protections of trust deposits and were not taxable as income to the mortuary-trustee, notwithstanding that (1) the portion of the sales price of urn sales to be deposited in the "maintenance fund" was not fixed in any recital in the deeds, nor in the representations oral or written made in accompanyment to such sales, but rather was fixed (first at 10% and later at 20%) only in and by resolutions passed by the mortuary's board of directors and stockholders (pp. 844-846), and notwithstanding, further, that (2) "The income from the maintenance fund was mingled with the other income of the [mortuary], and was expended for maintenance along with other funds of the [mortuary] and the income from the maintenance fund was . . . credited directly to

the profit and loss account of the corporation." (p. 844). 5a/ These adverse features had persuaded the Board of Tax Appeals (10 B. T. A. 65) that "inasmuch as the maintenance fund set apart by the petitioner was so free from outside constraint that the petitioner might borrow from it at will and limit its amount at will", the maintenance fund "constituted no more than a contractual obligation cognizable at common law [but] insufficient to create a trust either express or implied such as a court of equity would administer", and that in consequence, "all sums received by the petitioner were gross income." (Quoted in 31 F.2d 843, at p. 845.)

Upon appeal this Court reversed, holding that the deposited moneys (as well as the income therefrom) were valid, substantive holdings in trust and were <u>not</u> taxable to the mortuary upon receipt as income. In language central to the decision there and of crucial import as well for the case at bar, this Court said there at page 846:

> "While the petitioner here may be said to have had control of the money which it had placed in the maintenance fund, diversion of that fund for corporation purposes or any purpose other than that designated by its promise to maintain the same . . . [could] be enjoined by a suit in equity as a violation of the trust agreement. <u>The crucial question is, Did the petitioner's patrons possess the right to protect themselves</u>

5a/ Additionally the trust <u>res</u> was at times mingled with the general funds and holdings of the mortuary, and on one occasion the mortuary made an avowed "loan" to itself of $20,000.00 from the trust <u>res</u> and concededly used such loan "for corporate purposes" (p. 844).

and demand the preservation of the fund which the petitioner had covenanted with them to maintain and by its resolution had set apart for maintenance? The question is by the authorities answered in the affirmative." (Emphasis added.)

This language, and, indeed, the decision there reached upon the basis and authority thereof, is of direct applicability to the character of the deposit moneys at bar as non-taxable, trust holdings. At bar precisely as in the Portland decision, "The crucial question is, Did the [deposit fund beneficiaries] possess the right to protect themselves and demand the preservation of the fund . . ." and here, as there, "That question is by the authorities answered in the affirmative." Accordingly, under the authority of that decision the deposit moneys at bar are trust holdings and are not taxable as income to the petitioner upon their receipt.

Similarly, upon the authority of the Portland decision, the Tax Court in Broadcast Measurement Bureau, Inc. v. C. I. R. (1951), 16 T. C. 988, supra, and The Seven-Up Company v. C. I. R. (1950), 14 T. C. 965, supra, expressly held that certain deposits received in each case pursuant to trust undertakings were entitled to recognition as enforceable trusts, and were therefore not taxable as income to the affected taxpayer-trustee in each case, notwithstanding that there was a failure by the taxpayer in each instance to segregate the trust deposits from other receipts and holdings.

In the Broadcast Measurement Bureau case, the Tax Court,

at pages 1000-1001, aptly observed:

> "It may be argued that the [deposits] did not constitute trust holdings due to the fact that these funds were never segregated into separate bank accounts from sales receipts received [by the petitioner], loans received by the petitioner, and receipts from subscriptions to later studies. But such a comingling of the [deposited trust moneys] with other receipts does not destroy the identity of a trust fund. Seven-Up Co., 14 T. C. 965. Petitioner's books show the total amount of such fees it received and the unexpended balance thereof at all times. Any improper use of the unexpended balance of these fees by their custodian [i. e. the taxpayer-trustee] could have been enjoined by the [trust beneficiaries] by a suit in equity. Portland Cremation Association v. Commissioner, 31 F. 2d 843."

To like effect, and with like apt language upon facts closely parallel to those in the Broadcast Measurement Bureau case and closely parallel as well to those at bar, is the decision in The Seven-Up Company v. C. I. R., supra. The discussion expressed there at page 978 is in all respects parallel to the quotations excerpted above from the Portland Cremation Association and the

Broadcast Measurement Bureau cases.

C. Additionally, Important Precedents Arising In (a) Lease-Deposit Cases, (b) Executory Sales Contract Deposit Cases, and (c) Option Deposit Cases, Also Confirm the Non-Taxable Character of the Deposit Payments Paid to Petitioner and Held by it Under the 1961 Agreement-Form.

Further confirming the non-taxable character of the deposited moneys at bar are decisions in three analogous but non-trust areas of law. These deal, respectively, with (a) advance deposits paid by lessees to secure full performance of all lease covenants and, if not consumed so, thereafter to be applied by the lessor to satisfy the rent accruing for the last unit of the leasehold term; (b) advance deposits paid by the buyer in certain contingent, executory sales-contract cases where by the terms of the contract the deposits are to be applied against the sales price if a sale is ultimately consummated, but should a final sale not eventuate the deposits are to be accounted for and refunded by the seller to the buyer, and (c) deposits paid under certain option agreements whereunder the deposits accrue absolutely to the option-grantor (seller) should the option not be exercised but are required to be applied either in whole or some substantial part against the purchase price should the buyer elect to exercise the option.

These decisions separately and collectively, establish that even where deposit payments are concededly not held in trust by

the tax payer-receiver, but are avowedly usable by such receiver freely and without any restriction except subject to a contract duty to account therefor and to repay the same to the original payor should the period of or occasion for the deposit either fail or terminate, such deposits are to be treated as analogous to loans, and therefore as not constituting income, even though the holding does not even purport to be a holding in trust.

(a) Lease-Deposit Cases.

With respect to lease deposit cases creating precedents of persuasive and analogous authority for the issue at bar, a leading example is Clinton Hotel Realty Corp. v. C. I. R. (C. A. 5, 1942), 128 F.2d 968. There an advance deposit securing performance of the lease but at the end of the lease to be applied if(still available) as payment in satisfaction of the rent accruing for the last period of the lease term, was ruled to be during the interim period a "security deposit" only, or primarily, and therefore not taxable as income to the lessor. The Court summarized the law applicable to such dual-purpose, contingent-nature lease-deposit payments as follows at page 969:

> "[If the advance payment by the lessee] was paid and received as security, with no present right or claim of full ownership [by the lessor-recipient], it would not be presently income, although it was expected finally to be applied

> in payment of the last year's rent if nothing happened to prevent that. Barker's Estate v. Commissioner, 13 B. T. A. 562; Warren Service Corp. v. Commissioner, 2 Cir., 110 F.2d 723. In the latter situation, though the money is rightfully received, and if the parties so intend may be freely used, yet because of the acknowledged liability to account for it, there is no gain; just as in borrowing there is none." (Emphasis added.)

At page 970 the Court further stated of the deposit concerned in the case before it for review:

> "It was intended that lessor was not to hold it as a special deposit, but might use it as a general deposit, for he was to account for $1,000 per year as interest, in a credit against accruing rents. This does not destroy the character of the deposit as security, but the lessor's accountability for interest as well as for the principal emphasizes that character."

The emphasis upon the payment of interest by the deposit-holder in the Clinton Hotel decision has special relevance at bar since at bar petitioner expressly agreed to pay each year ten percent of the amounts deposited in such year as compensation for

its power to invest the deposit monies in mortuary real estate or improvements. Indeed, these payments were the very inducement which persuaded numerous applicants holding rights under the pre-1961 form of deposit agreements to cancel those agreements and substitute in their place new agreements in the new form entitling them to this measure of "interest" compensation [See T. R. 32; 47 T. C. at p. 393].

In accord with the Clinton Hotel decision both in reasoning and in holding see also such parallel and comparable cases as the follows: C. I. R. v. Riss (C. A. 8, 1967), 374 F. 2d 161, 171-172; Zaconick v. McKee (C. A. 5, 1962), 310 F. 2d 12, 15-16; Warren Service Corp. v. C. I. R. (C. A. 2, 1940), 110 F. 2d 723, 724-725; Harcum v. United States (E. D. Va., 1958), 164 F. Supp. 650, 651 (stating in part, "The mere fact that the lessor is not required to hold the fund as a special deposit does not in itself destroy the character of the deposit as security [and so long as the deposit functions as security for the due performance of continuing and unexpired covenants, and does not operate and serve merely as an advance payment of rent] the amount received by the lessors is not taxable as income until [either a breach of covenant occurs entitling the lessor to forfeiture of the deposit] or until the last [rental period expires]"; Mantell v. C. I. R. (1952), 17 T. C. 1143, 1148-1149 (stating aptly, in part, "If, on the other hand, the sum was deposited to secure the lessee's performance under the lease, it is not taxable income even though the fund is deposited with the lessor instead of in escrow and the lessor has temporary

use of the money."); 2 Mertens, Law of Federal Income Taxation, §12.99, p. 365, and §12.30, pp. 158-159; 3 Rabkin and Johnson, Federal Income, Gift and Estate Taxation, §42.05, pp. 4214-4215, and §42.03, p. 4206; Annotation, 146 A. L. R. 995, 1001-1002.

(b) Executory Sales-Contract Deposit Cases.

Decisions confirming by parallel, persuasive authority the non-taxable character and nature of the deposit moneys at bar arise also, as heretofore indicated, in certain cases dealing with advance deposits paid by buyers in connection with contingent, executory sales-contracts whereunder the deposits are required in terms to be applied at specified stages to the sales price if the sale is ultimately consummated, but where the deposits are required to be accounted for by the seller and repaid to the buyer should the sale for any reason fail or be frustrated.

A strong decision in this line of cases is Consolidated-Hammer Film Co. v. C. I. R. (C. A. 7, 1963), 317 F.2d 829. There advance deposit payments made by the government to a small manufacturer-seller undertaking to manufacture and sell a large, custom-ordered camera for government use were held to possess "[the] attributes of a financing arrangement in the nature of a loan", rather than to bear the indicia of advance sale partial payments; the deposits were accordingly held not taxable "[because] the proceeds of a loan do not constitute taxable income." (317 F.2d at p. 832, emphasis added.)

In Summit Coal Co. v. C. I. R. (1930), 18 B. T. A. 983, a small coal mining company undertook to sell a very large amount of coal for delivery over a period of years at $5.50 per ton, and the seller was induced to advance $150,000 to the coal company to be used by it to expand its mine and facilities to facilitate the necessary production. The $150,000 was agreed to be repaid out of the coal delivered under the contract at the rate of a $1.00 credit per ton of coal delivered. Despite the fact that the coal company used the money immediately upon its receipt for expenditures for equipment, labor and modifications of its mining facilities, the Board of Tax Appeals found the payments were not "income" at the time of their receipt because it appeared "clear" "that the advances so made were in the nature of loans to be repaid by the deduction from subsequent payments of $1 for each ton of coal delivered to Matlack and Raleigh. These advances became income to petitioner only as and when recoupment was [actually] made from deliveries." (p. 988, emphasis added.)

To like effect, see also Bremerton-Tacoma Stages v. Squire (W. D. Wash., 1951), 96 F. Supp. 718, 721-723. 6/

6/ The Tax Court also cites Schlude v. Commissioner (1963), 372 U. S. 128; American Automobile Association v. United States (1961), 367 U. S. 687; and Automobile Club v. Commissioner (1957), 353 U. S. 180, but those decisions are without force or applicability at bar. In all of those decisions the monies paid to the taxpayer were advance payments certain to become income at fixed future dates and the only claim of the tax payer was that he should be allowed deferment of taxability until the date or period fixed for full or proportionate performance on his part, or for the right of the payor to demand such, so that income which was certain to occur should be recognized for tax purposes not when merely received physically but concurrently with the performance, or the right to (Continued)

In cases involving advance deposit payments contingently subject to application as the payment in part or whole for the purchase of goods, a special feature makes it particularly inappropriate to attempt to treat such deposit payments as presently-taxable income to the seller. Not only is there involved in such a case the problem of the contingency of the sale as a general matter as discussed and treated above, but additionally where the deposit is contingently to be applied as constituting the part or whole purchase price of goods sold there arises the special complicating factor that the price to be received by the seller, or the cost to him of acquiring or producing such goods, or both such matters, may not yet be fixed or determined, or even determinable, and hence, also, the net gain or profit is not presently fixed nor even determinable. Under the Internal Revenue Act it is only gain or profit that is taxable as income, not simply gross receipts; in consequence, where the costs of goods and the sales price thereof, have not yet been fixed or agreed upon, it is particularly inappropriate to

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6/ Continued: demand the performance, which would "earn" the same and create a true right to accrue or be paid such money as "earned income". At bar quite another issue is presented. Here the money is not received with a full and free claim of right to user, as in the Schlude, American Automobile Association and Automobile Club cases, but is received only in trust, or at least subject to a contract duty contingently to account for and pay back such payments received, and the money deposited was withdrawable by the applicant (in actual practice) at will, and even on the applicant's death the money would not go to petitioner if the applicant should have moved or journeyed to a place outside of Los Angeles County (a contingency of substantial proportions, and over which petitioner had no control or influence whatever) or should the relatives in any event desire burial by another funeral director and request transfer of the deposited funds to such other funeral director.

attempt to class any advance deposit payments under any such contracts as presently-taxable income payments to the seller. (Consolidated-Hammer Film Co. v. C. I. R., supra, 317 F.2d 829, 833; Veenstra & DeHaan Coal Co. (1948), 11 T. C. 964, 966-968; Woodlawn Park Cemetery Co. v. C. I. R. (1951), 16 T. C. 1067, 1079-1080.)

This principle is operative at bar since the funeral service ultimately to be performed by petitioner if an applicant died within Los Angeles County (and if the applicant had not earlier withdrawn the deposit payments and if the relatives after death did not request transfer of the payments to another funeral director), included by the terms of the deposit agreement a sale of a coffin of a retail value reasonably equal (when added to the other elements of the funeral service)to the amounts on deposit by the applicant at the time of death, or such greater amount as the relatives might agree upon after death. Thus the price to be received by petitioner in the contingent, future sale of such coffin was neither fixed nor determinable in advance, nor was the cost thereof to petitioner fixed or determinable; in consequence, the amount of gain (and hence, of taxable income) was neither known nor determinable in advance of death (Rep. Tr. p. 25, line 23 to p. 27, line 1; Petr's Ex. 10, par. 2 and Petr's Ex. 11, par. 2).

(c) Option Deposit Cases.

A final line of cases affording persuasive parallel authority confirming the non-taxable character of the deposit payments at

bar deals with option-deposit payments paid by a buyer for the allowance of an option but with the further provision that should the option be exercised during its life the option payment shall apply, either partly or in whole, against an agreed-upon purchase price. In such cases the original deposit payment cannot be classed as present taxable income to the seller. This because the nature and character of the payment is not known nor classifiable at the time of initial payment. If the option lapses without being exercised, the moneys deposited become at that moment ordinary income to the seller; if, on the other hand, the option is exercised during its life, the moneys originally received, so far as they are made applicable by the contract to satisfaction in part of the purchase price, become at that time payments on account of a sale, taxable only as to the gain realized, and even as to that perhaps taxable only as a capital gain, not as ordinary income. Accordingly, such deposit payments are so characterized by ambiguity and contingency at the time of their initial payment that they are not under law classifiable as present income to the seller. (Virginia Iron, Coal and Coke Co. v. C. I. R. (C. A. 4, 1938), 99 F.2d 919, 921-922; C. I. R. v. Dill Company (C. A. 3, 1961), 294 F.2d 291, 299-301; Kitchin v. C. I. R. (C. A. 4, 1965), 340 F.2d 895; 3B Mertens, Law of Federal Income Taxation, §22.29, pp. 193-194.) These decisions parallel the premises at bar and further confirm that the deposits paid under the 1961 agreement-form, which would never become income to petitioner should the applicant withdraw the deposits before death or die outside Los Angeles County or should

the relatives after death request transfer of the deposit funds to another funeral director, should not be classed in law as <u>present</u> income to petitioner at the time of payment and prior to the occurrence of the applicant's death.

CONCLUSION

WHEREFORE, upon all of the grounds and for all of the considerations set forth above, petitioner respectfully submits that the deposit payments received by petitioner under the 1961 agreement-forms, precisely like the deposits received under the earlier pre-1961 agreements, were not properly to be classified as "income" to petitioner at the time of first deposit, and taxable so, and that the portion of the Tax Court's decision below holding to the contrary should be reversed.

Under true law all of such deposit payments were either payments <u>in trust</u> or were deposits so characterized by contingency and by duty (continuing and overhanging albeit conditional) to account for and repay such deposited sums as to be akin or comparable in essential nature merely to <u>loans</u> or to option or security or contingency deposits, and under all such views or parallel classifications were -- under tax law <u>fundamentals</u> -- <u>not</u> taxable as "income" at the time of their first payment.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William B. Murrish
WILLIAM B. MURRISH

APPENDIX 1

Exhibits	For Identification	In Evidence
Stipulation of Facts and Joint Exhibits 1-A through 9-I	Rep. Tr. p. 17	17
Petr's Ex. 10	19	21
Petr's Ex. 11	20	21
Resp's Ex. J	35	

No. 22118-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF
THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R. 28-45) are officially reported at 47 T.C. 391.

JURISDICTION

This petition for review (I-R. 52-57) involves federal income tax for the taxable year 1961. On June 2, 1964, the Commissioner of Internal Revenue mailed to taxpayer a notice of asserted deficiency in income tax which included the amount of $10,852.00 for the taxable year ending December 31, 1961. (I-R. 7-12, 16-22.) Within ninety days thereafter, on August 31, 1964, taxpayer filed a petition with the Tax Court for a redetermination of the deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-12.) The Tax Court filed its findings of fact and opinion (I-R. 28-45) on January 17, 1967, and a decision was entered on March 8, 1967 (I-R. 51). The case is brought to this Court by a petition for review filed June 7, 1967 (I-R. 52-57), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly held that funds collected by taxpayer from customers under a "Pre-Need Funeral Plan Agreement" providing that taxpayer could, at its option, use the collected funds for purposes beneficial to it, were includible in taxpayer's gross income for the taxable year in which they were received.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, infra.

STATEMENT

The relevant facts, as stipulated by the parties (I-R. 23-27), found by the Tax Court (I-R. 30-35), and supplemented by the evidence, are as follows:

Taxpayer, Angelus Funeral Home, is a California corporation, the principal business of which was providing funeral and burial services. For the taxable year 1961 and previously, it filed its income tax returns on a calendar year, accrual basis. (I-R. 30.)

During 1961 taxpayer entered into written contracts with certain individuals which contracts were designated, and bore the heading, "Pre-Need Funeral Plan Agreement." (I-R. 30.)

In about September, 1961, the form of written agreement which was used provided in pertinent part that the applicant (customer) agreed to pay taxpayer the total sum of X dollars, said obligation to be discharged by a relatively small down payment upon the signing of the contract followed by additional payments of relatively small amounts each month thereafter until the total sum had been paid in full. Taxpayer agreed that upon proof of the applicant's death it would apply the total amount theretofore paid toward the cost of applicant's funeral according to applicant's instructions which were given at the same time the contract was signed. The contract provided further that if the applicant died at any place where it was not practicable for taxpayer to conduct his funeral service that taxpayer would transmit the total amount paid under the contract to any reputable funeral home which was selected to conduct the funeral service. (I-R. 30-32.) The contract also provided (I-R. 63):

> 4. All amounts paid hereunder by Applicant shall be held by ANGELUS in irrevocable trust for the uses and purposes herein provided and in consideration of the services to be performed hereunder by ANGELUS, including the custody and conservation of the sums paid to it by Applicant, it is agreed that all income earned on the sums so paid shall accrue to and shall become the property of and payable to ANGELUS, as and when earned.

It further provided that the total amount paid under the contract by the applicant in any given calendar year was called the "Annual Payment" and that (I-R. 32)--

> 5. ANGELUS may, at its option (a) deposit all or any portion of the sums paid to it under this Agreement in one or more banks, trust companies or savings and loan associations, or (b) at any time before or after such deposit thereof, use all or any portion of such sums as collateral or payment for (i) the costs of any capital improvement to then existing mortuary facilities belonging to ANGELUS, and (ii) the acquisition and improvement of real property.

> 6. In consideration for its right to use the amounts paid hereunder by Applicant in the manner herein provided, ANGELUS agrees to pay to Applicant on or before the 31st day of December of each year an amount equal to ten percent (10%) of the Annual Payment (as above defined) made by Applicant during such year.1/

During and after September, 1961, some undetermined number of the applicants who had entered into a "Pre-Need Funeral Plan Agreement" with taxpayer prior to that time elected to and did sign the new form of agreement in order to be entitled to the payments of 10 percent therein provided for. (I-R. 32.)

1/ Prior to September, 1961, beginning in 1954 and continuing through August, 1961, identical provisions were used except for the following (I-R. 31):

> 4. The Parties agree that all sums paid by Applicant to ANGELUS shall be held by ANGELUS in irrevocable trust for the uses and purposes herein set forth and set forth in Funeral and Interment Instructions No.___.
>
> 5. ANGELUS agrees that it will deposit all sums paid to it under this Agreement in a bank, trust company or savings and loan association and that it will not thereafter withdraw such sums, or any portion thereof, except for the uses and purposes herein set forth; provided that ANGELUS may at its discretion withdraw such sums for the purpose of re-deposit in some other bank, trust company or savings and loan association.
>
> 6. The Parties agree that in consideration of the services performed and to be performed in the collection, custody and conservation of the sums paid to it by Applicant all interest earned on such sums shall accrue to, and shall become the property of, and payable to ANGELUS, as and when earned.

During 1961 and for some time prior thereto taxpayer maintained a general checking bank account. In addition thereto it maintained a special checking account (designated a clearing account) at Bank of America, and four savings accounts, each in a different savings and loan company, which savings accounts were designated as trustee accounts. (I-R. 32-33.)

As taxpayer collected amounts under the contracts it deposited them in the clearing account and credited a liability account on its books which was designated "Pre-Arranged Funeral Liability." Thereafter at irregular intervals most of these funds were transferred into one or more of the four trustee savings accounts. (I-R. 33.)

Taxpayer did not reflect the amounts collected on the contracts as income in the year the payments were received but returned income from the contracts only when it provided the funeral and burial services upon the death of a particular individual. It did so by debiting the "Pre-Arranged Funeral Liability" account on its books and crediting earned income. Taxpayer also reported as income the interest on the four savings accounts as such interest became due and such amounts are not in dispute. (I-R. 33.)

Commencing in 1959 and through 1961 John L. Hill, the president and the owner of all of taxpayer's stock, personally supervised the operation of taxpayer's pre-need funeral plan program and the handling of its funds. Prior to that time these responsibilites had been handled by taxpayer's treasurer. Hill, on assuming such responsibilites, discovered that some of the pre-need funds had been deposited in taxpayer's general checking account instead of in its special clearing account or any of the trustee savings accounts. Upon making such discovery Hill ordered that such funds be immediately segregated and this was accomplished by means of a check drawn on taxpayer's general account and transferring such funds to its trustee savings accounts. (I-R. 33-34.)

As of January 1, 1959, the balances in the four savings accounts and the clearing account totaled $15,609.16, while the ending balance of taxpayer's "Pre-Arranged Funeral Liability" account at December 31, 1958, was $24,706.07. Balances of such liability account and the totals in the clearing and savings accounts were as follows (I-R. 34):

Date	Pre-Arranged Funeral Liability	Total Clearing and Savings Accounts
12/31/59	$30,936.41	$34,100.99
12/31/60	39,501.16	40,535.56
12/31/61	51,297.77	53,172.68

During each year there were certain transfers from the clearing account to taxpayer's general checking account, but during each of such years the total of such transfers was less than the total amount which taxpayer declared as income from performances under the contracts plus interest earned on the four savings accounts. (I-R. 34.)

Taxpayer was not obligated to refund any monies collected pursuant to the terms of the contracts but nevertheless it voluntarily refunded the following sums (I-R. 35):

1959	$538.09
1960	899.85
1961	742.73

Taxpayer did not include as income, in the year of receipt, amounts paid to it under the "Pre-Need Funeral Plan Agreement." (I-R. 25.) The only item of the Commissioner's statutory deficiency notice in issue on this appeal is the deficiency arising from the taxpayer's failure to report as income in the year of receipt funds received under the "Pre-Need Funeral Plan Agreement" in effect on and after September, 1961. The Tax Court, while it sustained the taxpayer with respect to the earlier contract (I-R. 36-41), determined, with respect to the later contract in effect on and after September, 1961, that receipts could at taxpayer's option be used for purposes beneficial to it, and therefore were includible in its gross income in the year of receipt (I-R. 41-44).[2/]

2/ In view of taxpayer's failure to offer any proof as to the portions of the 1961 receipts attributable to the earlier and later forms of contracts, respectively, the Tax Court applied the "Cohan rule" (Cohan v. Commissioner, 39 F. 2d 540 (C.A. 2d) and made the best estimate it could, allocating one-half to each form of contract. (I-R. 44-45.) Taxpayer does not challenge the Tax Court's allocation.

The Commissioner has not appealed from that portion of the Tax Court's decision which is adverse to him, i.e., with respect to the Tax Court's determination that taxpayer's receipts under the terms of the earlier contract constituted trust funds not includible in its gross income in the year of receipt. (I-R. 36-41.)

SUMMARY OF ARGUMENT

It is axiomatic that taxable "net income" must be computed on an annual ("taxable year") basis, and that an item of "gross income" must be reported by a taxpayer using the "accrual" method of accounting in the taxable year in which his "right to receive" it becomes fixed, both in fact and amount. It is likewise settled, as a familiar corollary of the annual accounting rule, that a taxpayer (whether on the cash or accrual basis) who receives income under a claim of right and without restriction as to its use must report it in the year received, even though he may later be required to restore the income, or is obligated to use some or all of the income in a later year to meet related expenses. In harmony with these fundamental tax accounting principles, the Supreme Court, this Court, and other courts have held that prepayments for future services or goods, received by an accrual basis taxpayer without restriction as to their use, are reportable in the year of receipt, notwithstanding that the taxpayer is contractually obligated to perform the services or deliver the goods in a later year in consideration for the prepayments.

After analyzing the two types of funeral service contracts ("pre-need funeral plan agreement") here involved--those entered into before September, 1961, and those entered into afterward--the Tax Court concluded that prepayments under the earlier type were received and held in trust by taxpayer for the benefit of the customer until his death and hence were not reportable in the year of receipt, but that prepayments under the later type of agreement were not so received and held and therefore were reportable in the year of receipt. The Tax Court's conclusion is fully justified by the terms of the different agreements. Taxpayer's contention that the Tax Court erred insofar as it treated the later prepayments as includible in taxpayer's gross income for the year of receipt disregards both the terms of the post-August, 1961, agreement and the controlling decisions. The later agreement, as distinguished from the earlier one, imposed no restraint upon taxpayer's right to use the prepaid funds for purposes beneficial to it (acquisition or improvement of land); on the contrary, it expressly granted to taxpayer the option to use the funds for such purposes. The mere recitation elsewhere in the agreement that the funds were to be held "in trust" must be read in conjunction with the broad option granted taxpayer to use the funds for its own benefit, and when so read it becomes clear, as the Tax Court pointed out, that taxpayer had the right to use the funds for its own benefit under the later agreement. The prepayments were immediately available for taxpayer's use, at its option, for any type of acquisition or improvement of land, and taxpayer was under no obligation to return the funds. If any doubt otherwise existed regarding taxpayer's right to use these prepayments for its own benefit, it is dispelled by taxpayer's acknowledged right under the agreement to all income derived from the prepaid fund; indeed, taxpayer actually received and reported the interest earned.

The cases upon which taxpayer relies involved receipt and deposit of monies in trust. They apply to the funds received by taxpayer under the earlier (pre-September, 1961) agreement, as to which the Tax Court ruled in taxpayer's favor. They are inapplicable to the prepayments received under the later and different agreement involved on this appeal.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT FUNDS COLLECTED BY TAXPAYER FROM CUSTOMERS UNDER A "PRE-NEED FUNERAL PLAN AGREEMENT," PROVIDING THAT TAXPAYER COULD, AT ITS OPTION, USE THE COLLECTED FUNDS FOR PURPOSES BENEFICIAL TO IT, WERE TAXABLE INCOME TO TAXPAYER WHEN RECEIVED

A. Taxpayer had the right to use collected funds for purposes beneficial to it

Taxpayer, a funeral home, received periodic payments, under a written agreement, towards the total cost of funeral services to be performed by it at some undetermined future time.

The sole issue in this case is whether the recitation in the "pre-need funeral plan agreement" that the funds were to be held (I-R. 63) "in irrevocable trust for the uses and purposes herein provided" served to restrict the otherwise broad authority given taxpayer to use the funds for its own beneficial purposes. Throughout its brief, despite the clear language of the "pre-need funeral plan agreement" to the contrary, taxpayer has assumed that the agreement created an "irrevocable trust" which prevented beneficial use of the funds by the taxpayer. Were it not for the trust facade, the taxability of the funds, at the time of receipt, would be unquestioned. It is our contention that the mere insertion of the statement that amounts received by taxpayer would be held "in irrevocable trust for the uses and purposes herein provided", as qualified by the specific authority granted taxpayer to use the funds, left taxpayer's right to use the funds virtually unrestricted.

Taxpayer had the absolute right not only to all income earned from the funds, but also the option, at any time, to use the funds for its own benefit. The "pre-need funeral plan agreement" provided (I-R. 63) "that all income earned on the sums so paid shall accrue to and shall become the property of and payable to ANGELUS, as and when earned."[3/] It further provided that (I-R. 63)--

> ANGELUS may, at its option (a) deposit all or any portion of the sums paid to it under this Agreement in one or more banks, trust companies or savings and loan associations, or (b) at any time before or after such deposit thereof, use all or any portion of such sums as collateral or payment for (i) the costs of any capital improvement to then existing mortuary facilities belonging to ANGELUS, and (ii) the acquisition and improvement of real property.

3/ The interest was reported by taxpayer as income, and its taxability is not in issue. (I-R. 33.)

By the plain, unambiguous language of the agreement (I-R. 63), all sums received by taxpayer under the agreement were available for use, at its option, for any type of acquisition or improvement of real property.[4/] In addition, all income received from the funds

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4/ In the words of the Tax Court (I-R. 42-43):

> It seems quite clear to us that whereas the earlier form of contract created a custodial or trust arrangement, that the above-quoted language from the later form of contract effectively destroys any such possibility as to it, for this language imposes no restraint nor limitation upon petitioner's right to use the funds as they are paid in, the only limitation being upon the manner or purpose of such use. We observe further that the permitted purposes (improvement of facilities and acquisition and improvement of land) were both of sole benefit to the petitioner and of no conceivable benefit to the applicants.
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>
> Nor do we think the situation is altered by the circumstance that petitioner had not in fact acted under the (b) option above at any time during 1961. Petitioner had the right to do so "at any time before or after such deposit," [Emphasis supplied] and it is this right to use for its own benefit at any time which effectively prevents the arrangement from being a trust. Trust funds must be impressed with the prescribed duties and obligations when received. It is unimportant that a reserve be set up or that a trust res be later segregated by the recipient of the funds. The mere statement of such a course of action demonstrates that the recipient received such funds with no fetters upon its use of them, and then voluntarily and unilaterally chose to create the reserve or segregate the trust res. Of course, such funds were income to such a recipient when the money was received.

belonged to taxpayer when earned. Taxpayer had the unfettered right, at its discretion, to either deposit any or all funds received or use them for the acquisition and improvement of all manner of real property--all to taxpayer's benefit. No aspect of complete ownership was lacking. Only in the remote possibility that the applicant died in an area "not practicable" for taxpayer to conduct funeral services did an obligation to return the funds exist.[5/] The funds received were not returnable without taxpayer's consent.

B. Income must be reported in the year received

Taxpayer reported its income on the accrual basis. (I-R. 30.) The principles governing the accrual and reporting of income by taxpayers, such as Angelus, who employ the accrual basis have long been settled.[6/] It is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income. An item of gross income must be reported by taxpayer using the accrual method of accounting in the taxable year in which his right to receive it becomes fixed, both in law and fact. Spring City Co. v. Commissioner, 292 U.S. 182, 184; Security Mills Co. v. Commissioner, 321 U.S. 281, 286-287; Commissioner v. Hansen, 360 U.S. 446, 464.

5/ Even in this situation, nothing would preclude taxpayer from employing another funeral home to conduct the services.

6/ The pertinent statutory provisions (1954 Code Sections 61(a), 441, 446, 451) are set forth in the Appendix, infra.

Here, however, this settled rule of law need not even be relied on as in fact the amounts involved were actually received and, accordingly, must be included in gross income in the year of receipt. Each "taxable year" must be treated as a separate unit, and all items of gross income must be reflected in terms of their posture at the close of such year. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 363, 365; Heiner v. Mellon, 304 U.S. 271, 276; Guaranty Trust Co. v. Commissioner, 303 U.S. 493, 498; Security Mills Co. v. Commissioner, supra, p. 286; United States v. Consolidated Edison Co., 366 U.S. 380, 384. It is likewise well settled that a taxpayer, whether on the cash or accrual basis, who receives income under a claim of right and without restriction as to its use must report it in the year received even though he may later be required to restore the income. North American Oil v. Burnet, 286 U.S. 417, 424; United States v. Lewis, 340 U.S. 590, 591; Healy v. Commissioner, 345 U.S. 278, 281; Crellin's Estate v. Commissioner, 203 F. 2d 812 (C.A. 9th), certiorari denied, 346 U.S. 873; United States v. Merrill, 211 F. 2d 297, 303 (C.A. 9th); see also, 1954 Code Section 1341 (26 U.S.C. 1964 ed., Sec. 1341). Income must be reported in the year received even if the taxpayer is obligated to use some or all of the income in a later year to meet related expenses. American Automobile Assn. v. United States, 367 U.S. 687; Schlude v. Commissioner, 372 U.S. 128.

Admittedly, receipts by a trustee expressly and solely for the benefit of another are not income to the trustee in his individual capacity. Healy v. Commissioner, supra, p. 282. A prepayment for future services which the taxpayer-payee is prohibited from using as its own, but must hold in trust until the services are performed, is not reportable until the restriction on its use disappears, i.e., until the services are performed and the trust is thereby terminated. Seven-Up Co. v. Commissioner, 14 T.C. 965; Broadcast Measurement Bureau, Inc. v. Commissioner, 16 T.C. 988. As an obvious corollary, a prepayment for future services which the taxpayer-payee is specifically authorized to use as its own, as in this case, even though purportedly held in trust until the services are performed, is reportable when received. The trust facade in this agreement, as previously discussed, was meaningless. In determining the validity of a fund as a trust, printed words or labels are not determinative. National Memorial Park v. Commissioner, 145 F. 2d 1008, 1012 (C.A. 4th), certiorari denied, 324 U.S. 858. Even if, however, the effectivness of the trust is assumed, the critical factor here is that the funds were nevertheless available to promote capital improvements and acquisitions by taxpayer, thus constituting income when received. Gracelawn Memorial Park v. United States, 260 F. 2d 328, 332 (C.A. 3d).

In Portland Cremation Ass'n. v. Commissioner, 31 F. 2d 843, this Court recognized that an essential attribute for the exclusion of funds received in "trust" from gross income is that such funds not be subject to diversion for corporate purposes or any other purposes (p. 846). In Portland taxpayer agreed to maintain certain niches, urns and vaults forever. All sales were made with the representation that a permanent maintenance fund would be established and that the fund could not and would not be used for any other purpose. Such amounts were held to be excludible from gross income. Unlike Portland, the agreement in this case specifically authorized taxpayer to use the funds for its corporate purposes.

More recently, in Mutual Tel. Co. v. United States, 204 F. 2d 160, this Court again recognized that if a taxpayer is free to use funds in its possession, at its option, such funds are includible in its gross income. In that case, funds were originally received by the telephone company without any right of use for its benefit. This Court held that such funds were not income to it at that time. Subsequently, under an order of the supervisory Public Utilities Commission, the telephone company was given permission to use the funds for a restricted and specified purpose of benefit to it. Permission to use the funds by depositing them to the "Retirement System" of the telephone company was held by this Court to make the funds taxable income to the telephone company at that time. In its opinion below, the Tax Court correctly followed _Mutual_ in reaching its decision. (I-R. 44.) The creation of a trust, into which funds received are placed, is not in and of itself sufficient to prevent the trust money from being treated as income. The vital factor is the terms and provisions of the particular trust involved. The questions of control by, and inurement to the benefit of, the taxpayer are of prime importance. Where trust funds are available, under the terms of the trust, to promote future capital improvements in the taxpayer's property, or, even more directly, the acquisition and improvement, without limitation of _any_ real property at taxpayer's discretion, such funds are clearly available for taxpayer's benefit and, accordingly, includible in its gross income. _Jefferson Memorial Gardens, Inc_. v. _Commissioner_, 390 F. 2d 161, 166 (C.A. 5th); _Metairie Cemetery Assn_. v. _United States_, 282 F. 2d 225, 230 (C.A. 5th); _National Memorial Park_ v. _Commissioner_, _supra_; _Gracelawn Memorial Park_ v. _United States_, _supra_; _Mount Vernon Gardens, Inc_. v. _Commissioner_, 298 F. 2d 712, 716 (C.A. 6th). As was so aptly pointed out by the court in _National Memorial Park_ v. _Commissioner_, _supra_. p. 1014, should the taxpayer prevail here, the door would be open for the establishment of all manner of "trust" funds with very elastic provisions allowing an increase in economic benefit without tax liability. Such a situation is altogether inconsistent with the idea of an equitable, proportionate tax burden.

C. Funds received were neither on loan nor on deposit

Taxpayer in its brief now contends, belatedly and without basis in fact, as an alternative to its trust contention, that the monies received "are to be treated as analogous to loans, and therefore as not constituting income, even though the holding does not even purport to be a holding in trust." (Br. 23.) The inapplicability of this contention is patent. No obligation to repay existed. Here, taxpayer's broad, specific authority to use and retain the funds received distinguish the situation from cases cited by taxpayer in which funds received were determined to be deposits or loans. Cases such as Clinton Hotel Realty Corp. v. Commissioner, 128 F. 2d 968 (C.A. 5th), cited by taxpayer, involve funds with all of the characteristics of security. Only upon the occurrence of a specific, unexpected term or condition would the deposit be available for credit, at the end of the term, to taxpayer's account. Consolidated-Hammer Dry Plate & Film Co. v. Commissioner, 317 F. 2d 829 (C.A. 7th), involved income from sales of property under the unique provisions of Government procurement regulations. Partial payments made by the Government on a contract were reportable as accrued income only when delivery and acceptance of the product was made. Other cases cited involve findings of fact made by a trial court involving particular facts supporting the existence of a loan or deposit. No facts to support such a finding in this case exist. The Tax Court property did not make such a finding nor does the taxpayer assert error in the Tax Court's failure to do so.

Examination of the "pre-need funeral plan agreement" (I-R. 63) reveals that it is a contract for funeral services. Only if "the full amount of the Total Funeral Cost has been paid," does taxpayer have the obligation to supply a casket. The partial payments in issue, accordingly, are payments purely for services. No obligation to supply a casket exists until the full contract price is paid. Taxpayer alleges (Br. 28) that since the cost of the casket is indeterminable it is "particularly inappropriate to attempt to treat such deposit payments as presently-taxable income to the seller."

Nothing in the Treasury Regulations or decisions require the matching of a particular purchase with a particular item in inventory. See Schlude v. Commissioner, supra; American Automobile Assn. v. United States, supra. Even if it be concluded that the advance payments were, partially, for goods to be delivered in the future -- which we contend clearly they are not until the contract price is fully paid -- this factor does not alter the requirement that income must be reported in the year received. See Farrara v. Commissioner, 44 T.C. 189; Hagen Advertising Displays, Inc. v. Commissioner, 47 T.C. 139 (pending appeal, C.A. 6th).

In summary, the basic issue is whether the inclusion in the agreement of the words "irrevocable trust" served to divest taxpayer of his undisputed claim of right to, and use of, the funds received. So far as taxpayer's dominion and control of the funds are concerned -- the crucial consideration -- it is clear that in all essential aspects taxpayer's use and control of the funds were no different than if the words "irrevocable trust" had been omitted from the agreement. The funds constituted an item of gross income when received.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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MAY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ____________ day of May, 1968.

BENNET N. HOLLANDER
Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;

*   *   *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 441. PERIOD FOR COMPUTATION OF TAXABLE INCOME.

(a) Computation of Taxable Income.--Taxable income shall be computed on the basis of the taxpayer's taxable year.

(b) Taxable Year.--For purposes of this subtitle, the term "taxable year" means--

(1) the taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) the calendar year, if subsection (g) applies; or

(3) the period for which the return is made, if a return is made for a period of less than 12 months.

(c) Annual Accounting Period.--For purposes of this subtitle, the term "annual accounting period" means the annual period on the basis of which the taxpayer regularly computes his income in keeping his books.

(d) Calendar Year.--For purposes of this subtitle, the term "calendar year" means a period of 12 months ending on December 31.

*   *   *

(26 U.S.C. 1964 ed., Sec. 441.)

SEC. 446. GENERAL RULE FOR METHODS OF ACCOUNTING.

(a) General Rule.--Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

(b) Exceptions.--If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income.

(c) Permissible Methods.--Subject to the provisions of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting--

(1) the cash receipts and disbursements method;
(2) an accrual method;
(3) any other method permitted by this chapter; or
(4) any combination of the foregoing methods permitted under regulations prescribed by the Secretary or his delegate.

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(26 U.S.C. 1964 ed., Sec. 446.)

SEC. 451. GENERAL RULE FOR TAXABLE YEAR OF INCLUSION.

(a) General Rule.--The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period.

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(26 U.S.C. 1964 ed., Sec. 451.)

NO. 22118-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGELUS FUNERAL HOME,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF

PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

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TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

The exchange of Petitioner's Opening Brief and Respondent's Brief at bar makes clear the narrow, sole issue of law dividing the parties.

The case reduces simply to this: During the 1961 tax year 1/ petitioner Angelus Funeral Home received -- concededly under and pursuant to a written instrument of trust, entitled "Pre-Need Funeral Plan Agreement" (Petr's Ex. 11) -- advance

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1/ Strictly speaking, during the portion of the 1961 tax year commencing in September, 1961 (T. R., Vol. I, pp. 31 et seq). Hereafter, for purposes of brevity, all references to "the 1961 tax year" will be intended to refer to the portion of that year commencing in September, being the only period of tax liability in issue on this appeal.

cash payments to be applied on the applicant's death to furnishing agreed funeral services and a casket, or to be returned to the designee of the applicant's family should death occur outside Los Angeles County where funeral services by Angelus would "not [be] practicable" (Id., par. 7). By its terms the written instrument of trust required Angelus as trustee to hold the advance payments until the applicant's death "in irrevocable trust" (Id., par. 4).

Thus it is undisputed that the taxpayer during the 1961 tax year received the advance cash payments contended by the Commissioner on this appeal to be taxable income, but it is equally undisputed that these moneys were received by the taxpayer not as an ordinary cash recipient but as the trustee under a valid, fully signed and executed written instrument of trust.

Moreover, although the taxpayer is the trustee under the written trust and although the subject matter of the trust is of interest and benefit to the taxpayer as well as to the funeral applicants as the trust beneficiaries, and although any income from the trust during its life is awarded by the trust document to the taxpayer as the equivalent of reasonable trustee fees (the amounts in each individual trust being small, and the bookkeeping and administrative work being proportionately substantial), it is admitted by the Commissioner, and is established as the law of the case, that none of these features, either separately or collectively, destroy the trust character of the holdings or make the same taxable as income to the taxpayer upon receipt. This

because all of these features equally characterized -- indeed, in identical words -- the parallel written trust document (Petr's Ex. 10) under which the taxpayer received prior moneys in identical circumstances for the earlier tax years of 1959 and 1960 for which years the trial court's holding below that the moneys received were valid trust holdings, not taxable as income to the taxpayer, is now a final judicial holding at bar in consequence of the Commissioner's failure to appeal therefrom.

The sole distinguishing feature separating receipts under the trust document used during 1961, the tax year in issue on this appeal, from the prior concededly trust-protected receipts under the trust document used in the earlier tax years 1959 and 1960, is a change in the language as to trustee-powers allowing Angelus under the amended trust document to invest the trust moneys -- still explicitly to be held "in irrevocable trust" -- in real property and improvements rather than solely in bank deposits, as previously required. 2/

The Commissioner urges that this single change in trust powers so converted the taxpayer's status as to render taxable the trust-held moneys otherwise concededly immunized from present income-tax liability. The Commissioner urges no special case authorities but relies instead upon the general principles of

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2/ Specifically, under the 1961 trust document Angelus, as trustee, is granted power to use trust moneys "as collateral or payment for (i) the costs of any capital improvement to then existing mortuary facilities belonging to ANGELUS, and (ii) the acquisition and improvement of real property" (Petr's Ex. 11, par. 5).

the "claim of right doctrine" (Resp. Br. 9 and 15). The Commissioner urges that the taxpayer under the 1961 trust document could use the trust moneys "for purposes beneficial to it (acquisition or improvement of land)" (id., p. 10), albeit only within prescribed limits and only during the trust period, and contends that Angelus' essential status was thus made akin to that of a cash recipient receiving money "under a claim of right and without restriction as to its use" (Resp. Br. 15). The trust document, says the Commissioner, was in such circumstances rendered "meaningless" and a "facade" (Id., p. 16).

Taxpayer does not quarrel with the claim of right doctrine but contends it is inapplicable here.

The Commissioner freely concedes that for the claim of right doctrine to apply the money must be received "without restriction as to its use" (Resp. Br. p. 15) and concedes that "receipts by a trustee . . . are not income to the trustee" (Id., p. 16). Specifically, the Commissioner concedes apropos the instant case that "[a] prepayment for future services which the taxpayer-payee is prohibited from using as its own, but must hold in trust until the services are performed, is not reportable until the restriction on its use disappears, i. e., until the services are performed and the trust is thereby terminated." (Id., p. 16).

Beginning with these concessions, and with the law of the case that the trust subject matter and the taxpayer's position as trustee and all other of the unchanged trust provisions do not militate against the tax-immunity of the trust, taxpayer contends

that under elementary trust law -- fully accepted and enforced in the law of California where the trust at bar is to be administered -- the trust power complained of by the Commissioner, despite the reach of its abstract terms, would be narrowed, confined and construed by a court of equity so as to preserve and protect fully the trust purposes and the interests of the beneficiaries. It is taxpayer's contention that under settled judicial trust-law principles a literal power in a trustee to invest trust moneys in a manner potentially benefitting himself as well as, or in lieu of, the trust itself, is subject to strict and narrow construction and to "jealous" judicial restraint and review, to insure that the rights of the beneficiaries will be safeguarded and that the power will be exercised only in "uberrima fides". (See the discussion and the authorities cited in Petitioner's Opening Brief, pages 14-17.)

The Commissioner ignores totally, and makes no response to, these vital trust-law fundamentals which genuinely confine and restrict the taxpayer's powers as a trustee under the trust document in issue at bar. The Commissioner stresses only the bare language of the trust power, contending that the face of the power could embrace liberty to invest in "any" kind of real property, and implying that the taxpayer might invest the trust funds in wasting or high-risk investments to the taxpayer's selfish interest and to the prejudice and risk of the trust and the trust beneficiaries.

But, as indicated above, the effective, stern trust-remedy powers of a court of equity would permit no such abuse. The permitted investments are limited in terms to investments in real

property [3] (an investment form lending itself relatively easily to safeguards and controls to secure the trust interests), and in the premises of the parties (funeral applicants and a funeral-home trustee), considered together with the high public interest and public policy attending and protecting these funeral-deposit relationships (now embodied in newly-enacted California statutes requiring the protection even of independent trustees, but with such protection expressly permitted investments even in mortuary endowment care trust funds [4]), it appears plain that under California law permitted investments under the trust power concerned at bar would be confined by trust principles and public

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3/ The circumstance that the permitted use of trust funds is a limited use only, is worthy of particular and special note. Under the trust provisions the trust moneys may only be placed in either bank deposits or in real property or improvements thereon. The money may not be used by Angelus to finance or acquire funeral cars, or caskets, or any other form of chattel. Neither may it be used to pay payroll expenses or the costs of advertising or utilities or for any other business expense. Thus its power of use is far less "unrestricted" than the use allowed for an ordinary loan. Yet money received, and used, under a simple loan, or subject to a full or contingent duty to repay, or to produce upon need or demand, according to the terms of a contract or other obligation, whether the duty to repay or to produce upon a future date be fixed, conditional or contingent upon the occurrence of a contingent future event, is concededly not income in a presently-taxable sense. See the cases, excerpts and discussion in Petitioner's Opening Brief at pages 22-31, and the discussion infra beginning at page 9 et seq., reviewing such material briefly. Note, moreover, that the taxpayer paid a form of interest for its limited right of user at bar. Angelus for such right paid each applicant ten per cent of all sums paid in by the applicant within each calendar year (Petr's Ex. 11, par. 6; R. T. 50-51).

4/ California Business and Professions Code, Sections 7736 and 7738, enacted in 1965.

policy to investments in real property undertaken in such form and subject to such reasonable safeguards and securities as to adequately and fairly protect the rights of the trust and the trust beneficiaries and to insure the reasonable liquidity of the trust consistent with its purposes and foreseeable needs. 5/ No more could be asked to protect the beneficiaries and the public interest, and no less would equity allow -- and, moreover, an equity court, not the taxpayer, would be the final arbiter.

It does not matter that these limitations on taxpayer's trustee powers are not expressed in the trust document. They are policy-imposed, equity-enforceable judicial limitations, and the test of trust-sufficiency and nontaxability in this income-taxation area, as formulated ably by this Court in the Portland Cremation Association case, is whether under law the trust beneficiaries (here the funeral applicants) would "possess [under the trust document] the right to protect themselves and to demand the preservation of the fund" through the powers and remedies of a court of equity. As this Court said there, and as is equally applicable at bar, "That question is by the authorities answered in the affirmative." (Portland Cremation Association v. C. I. R. (C.A. 9, 1929), 31 F.2d 843, 846.)

To all this the Commissioner makes no response.

5/ Indeed, it is undisputed at bar that at all times the taxpayer had a cash reserve, consisting of money on deposit in the trustee accounts maintained pursuant to the trusts here concerned, equal to or exceeding the total amount of its liabilities under all of its "Pre-Need Funeral Agreements" (Joint Tax Court Exhibit 9-I, Schedule I).

Moreover, the Commissioner also fails to meet or distinguish the Portland Cement Association decision as a close case-precedent at bar. The Portland decision holds squarely that a trust for funeral-area care and maintenance is not taxable to the funeral-home trustee, even though the claimed trust there concerned was oral and "inferr[able] from [the] facts and circumstances" only, and hence was far less open and plain than the express, written trust created at bar. (31 F. 2d at p. 846.) A trust to provide funeral services is hardly distinguishable from a trust to provide funeral-area care and maintenance, and although the trust in the Portland case was a trust in perpetuity, while the trust at bar is only for a conditional, defined period, the same principles of equity-enforceability, and consequent nontaxability to the trustee, appear equally applicable and dispositive. Shortly put the rule of the Portland decision is that nontaxability turns upon the availability of equitable enforcement powers adequate and effective to confine the trustee to permissible conduct within and consistent with the public-policy trust purposes intended by the parties. Such equitable policing powers exist at bar as fully as upon the facts of the Portland case and in consequence, here as there the public interest favors the validity of trusts for providing future funeral services or funeral-area maintenance and care; on these foundations, nontaxability as to the funeral home-trustee follows as a matter of law. 6/

6/ The Commissioner suggests that nontaxability should be denied at bar out of policy consideration for fear of setting (continued)

The Commissioner also passes over either without any discussion or with only cursory, passing treatment, the many apt classes of authorities marshalled by petitioner holding that even without express trust limitations where a cash-receiving taxpayer is in fact, by contract or lease or other obligation-source, enforceably required to hold cash received subject to a condition or to a clear uncertainty as to ultimate full right to use the money in fee or as income, no present income taxability can or does arise.

Thus the Commissioner ignores or dismisses merely in passing and without fairly treating or meeting, (1) taxpayer's lease-deposit cases 7/ involving lessee deposits which a landlord must hold during the lease period to apply against any covenant-

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6/ (continued) a precedent which might "open the door" to schemes solely for tax evasion. (Resp. Br. 18). The principles of public policy truly applying, however, are those voiced in the Portland decision favoring the sustaining of private trusts to insure the providence of future funeral services or funeral-area care and maintenance; as to the risk of tax or other abuse the supervisory powers of courts of equity are an adequate guard, and to disallow these private trusts, or to subject them improperly to disabling income taxation, would do a disservice to the public interest as well as to the immediate private parties. The very object of these public-interest trusts is to insure the availability of funds to provide decent burial and funeral services and care at the time of death of the contracting applicants (many of whom are of most humble means as the record at bar discloses) and this purpose should be furthered and safe-guarded by the resources and powers of the law, not frustrated or burdened thereby.

7/ The cases concerned here are cited and discussed in Petitioner's Opening Brief at pages 23-26 and include Clinton Hotel Realty Corp. v. C. I. R., 128 F. 2d 968; C. I. R. v. Riss, 374 F. 2d 161; Zaconick v. McKee, 310 F. 2d 12; Warren Service Corp. v. C. I. R., 110 F. 2d 723; Harcum v. United States, 164 F. Supp. 650; and Mantell v. C. I. R., 17 T.C. 1143.

breach by the lessee, should any such occur during the leasehold term, with right by the lessor to claim the deposit in fee as rent for the last rental period arising only at the end of the leasehold term when the risk of any possible covenant-violation has expired; these cases firmly hold that such deposits are not taxable to the landlord when paid as present income even without the creation of any express trust, and even though the landlord may be given right to use the deposit moneys freely for any purpose in the interim period, subject only to a duty under the lease to credit the amount of deposit against any covenant breach should any such occur; (2) taxpayer's contract-deposit cases [8/] giving similar effect to deposits made under executory sales contracts where the deposits possess "[the] attributes . . . of a loan", rather than the indicia of advance partial payments, or where the deposits are to apply contingently upon possible, but contingent, future sales of goods at prices and upon terms not presently determinable, all of which cases hold such advance deposits are not taxable to the contract recipient at the time received; and (3) taxpayer's option deposit cases [9/] treating of deposits paid under contracts or

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8/ The cases here concerned are discussed in Petitioner's Opening Brief at pages 26-29 and include Consolidated-Hammer Film Co. v. C. I. R., 317 F. 2d 829; Summit Coal Co. v. C. I. R., 18 B. T. A. 983; Bremerton-Tacoma Stages v. Squire, 96 F. Supp. 718; Veenstra & DeHaan Coal Co., 11 T. C. 964; and Woodlawn Park Cemetery Co. v. C. I. R., 16 T. C. 1067.

9/ These cases are discussed in Petitioner's Opening Brief at pages 29-31 and include Virginia Iron, Coal and Coke Co. v. C. I. R., 99 F. 2d 919; C. I. R. v. Dill Company, 294 F. 2d 291; and Kitchin v. C. I. R., 340 F. 2d 895.

instruments of sale whereunder the option payment is to apply against the sales price if the option is exercised, and whereunder, accordingly, it cannot be told at the time of the option payment whether as to the recipient of the money the payment will ultimately amount to ordinary income (money received for the grant only of an option) or capital gains income (money received as part payment for the sale of a chattel or of land), and if a capital gain, whether a short or a long term capital gain; under these cases it is unvaryingly held that the cash-receiver incurs no income taxability at the time of receipt nor until the ambiguity of the character of the payment is resolved by the acts of the parties.

All of these cases by analogy confirm that moneys received under a genuine contract or other obligation to repay the same (even contingently, as at bar) or under a present uncertainty as to whether the money will ultimately become income at all, or if it becomes income whether it will be ordinary income or capital gains (and within the latter, whether short or long term in character) are <u>not presently taxable to the recipient as income.</u>

The Commissioner makes no responses to any of these cases except to say that the case at bar is not within the factual premises of any of these cited classes of cases. But the decisions concerned here are cited not as direct authorities but as decisions persuasive by <u>analogy.</u> The confirm in principle that money received subject to limitations of use, or subject to contingent obligations to repay the money or to credit its amount against lease or contract violations by the opposing party, or subject to

uncertainties as to its nature and character for taxation purposes, is not presently taxable to the recipient as income. So holding, they illuminate the trust-law issue of taxation at bar, and confirm the propriety of holding under trust law fundamentals and the precedent of the Portland decision that taxpayer, as the trustee of an enforceable, viable trust, incurred no personal income taxation liability on receiving the trust payments put in issue in the case at bar.

Respectfully submitted,

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Attorneys for Petitioner

<u>CERTIFICATE</u>

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William B. Murrish
WILLIAM B. MURRISH

No. 22120

IN THE

United States Court of Appeals
For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT, wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered on a jury verdict for appellee (defendant) on May 9, 1967, and from an order entered on May 12, 1967, denying appellants' motion for a new trial.

There is no issue of jurisdiction in the District Court, where the action is admittedly based upon diversity of citizenship (Title 28 U.S.C. Section 1332). Title 28 U.S.C. Section 1291 gives this court jurisdiction of this appeal.

STATEMENT OF THE CASE

It is admitted (Pretrial Order, R. 41, p. 2) that appellant Margie J. Elliott on January 12, 1966, purchased six bottles of a soft drink beverage called "Like" from a retail grocery store; that appellee bottled and sold to the retailer the product contained in said bottles; that Margie J. Elliott cut her left hand on January 16, 1966; and that said injuries necessitated medical and surgical treatment.

It is undisputed (Tr. 28-30) that appellant's left hand was cut when she, using a bottle opener commonly used for such purposes (Ex. 1), attempted to open one of the bottles of "Like" and the bottle (Ex. 2) fragmented in her hand.

Appellant had personally purchased the beverage on January 12, 1966, carried the six bottles home, and placed them in her refrigerator all without untoward incident (Tr. 25-26). No evidence, apart from opinions expressed by the expert witness presented by the appellee, was offered indicating any abuse of the bottles either in the retail store or by the purchaser.

Between the time the beverage was purchased and January 16, 1966, appellant Margie J. Elliott, using the same opener and the same physical methods, had opened two of the other bottles without incident (Tr. 26, 28-29).

Because of the fragmenting of the bottle and the cutting of her hand, appellant required immediate medical attention (Tr. 42-43). In addition, on August 9, 1966, surgery was performed on appellant's hand (Tr. 92-93; Ex. 5).

Moreover, it is undisputed that, as a result of the administration by needle insertion of a brachial block anesthetic preliminary to the August 9, 1966, operation, hemorrhaging and the formation of a hematoma or bruising occurred at the site of the needle insertion causing pain and discomfort in appellant's left shoulder and arm (Tr. 47, 112-113, 189-190, 235).

The medical testimony as to the extent of disability caused appellant by the administration of the anesthetic, and the necessity of surgery to correct conditions caused by the insertion of the needle, is at variance. However, it is agreed that, without surgery, the disability is permanent (Tr. 49-50, 119, 193, 235). In addition, it is undisputed that appellant has some permanent disability in her left hand (Tr. 49-50, 96, 118-119, 191).

Appellant presented the testimony of Charles V. Smith, an expert witness experienced in working with and testing the properties of glass (Tr. 135-138), who, based upon his personal examination and testing of the broken bottle (Ex. 2), stated that the bottle was fractured prior to appellant's attempt to open it (Tr. 158); that the fracture defects in the bottle were present and observable to the naked eye before the bottle left appellee's bottling plant (Tr. 159-160); that the defects developed during the bottling operation (Tr. 160-161); and that there was no evidence of any material damage to the bottle occurring after it left appellee's premises (Tr. 162).

Mr. Smith reasoned as follows (Tr. 159-160):

"Q. Now, Doctor (sic), based upon your examination and the facts I asked you to assume, do you have an opinion as to whether there were defects in the bottle observable to the naked eye before the bottle left the Defendant's plant, the bottler's plant?

"A. Yes, I have an opinion.

"Q. What is your opinion?

"A. That defects were there.

"Q. On what do you base that opinion?

"A. The facts are quite evident to me from a technical standpoint that the bottle in normal condition, the cap in normal condition, that its seal could not be broken by mere opening attempts which do not even distort the cap. That is the primary significance. Bottles just don't fall apart. The fact that the cracks emerge and radiate from under the cap at the point of cap crimping, and the fact that both cracks propagate from that position downward, is supporting strength, and considerable supporting strength to the fact that a machine operation produced these cracks, weakened the bottle by actually producing cracks and fractures through the glass to the point where it now is somewhat like the glazier's glass that has the scratch in it. This to me has had a crack in it from the capping operation, and in the absence of no surface damage that would come from normal handling in the store or the home."

As indicated by their pretrial contentions (Pretrial Order, R. 41, p. 7, contention No. 7), their trial brief (R. 80-84), their proposed instructions numbered 3 and 12 (R. 85-106), and their post trial memorandum in support of motion for a new trial (R. 109-116), appellants have consistently predicated their right to recover upon the alternative theories of (1) appellee's negligence and/or (2) appellee's breach of its implied warranty that the bottle in which it sold its product was reasonably fit and suitable for its intended use.

However, the trial court by refusing to inform the jury of appellants' breach of warranty contention (Tr. 363-364) and by refusing to present to the jury appellants' proposed Instructions 3 and 12, restricted the trial in its liability aspect to the sole question of appellee's negligence (Tr. 366, l. 17). Appellants took timely exception to the District Court's refusal to grant the instructions cited (Tr. 383).

QUESTIONS PRESENTED

1. Did the District Court err in failing to present appellants' breach of warranty contention to the jury?

2. Did the District Court err in failing to present to the jury appellants' proposed Instructions 3 and 12?

3. Did the District Court err in entering judgment for appellee based upon the verdict of the jury?

4. Did the District Court err in denying appellants' Motion for a New Trial?

SPECIFICATION OF ERRORS

1. The District Court erred in refusing to charge the jury that appellants contended that the injuries sustained by appellant Margie J. Elliott had resulted proximately and directly from the breach by the defendant of its warranties of fitness and suitablity of the product "Like" for the purpose represented and intended.

2. The District Court erred in refusing to present to the jury appellants' proposed Instruction No. 3, which reads as follows:

> "The defendant, as a bottler of food stuffs, impliedly warranted to the plaintiff and other customers of its products that the bottles in which its product was sold were reasonably fit for the purpose for which they were intended.

> "If you find that the bottle which broke in plaintiff's hand was defective to the extent that it was not reasonably fit for use as a bottle for the soft drink, that the defect was present before the bottle left the defendant's control, and that the defect caused plaintiff's injuries, your verdict must be for the plaintiff.
>
> "Negligence is not an element of required proof when recovery is sought for breach of a warranty, and no evidence is necessary to establish recovery for a breach of warranty."

3. The District Court erred in refusing to present to the jury appellants' proposed Instruction No. 12, which reads as follows:

> "It is not necessary that plaintiff prove both the defendant's negligence and a breach of warranty. If you find either that the defendant was negligent in one or more respects, or that the defendant breached a warranty, and that such negligence or breach of warranty caused plaintiff's injuries your verdict shall be for the plaintiff."

4. The District Court erred in entering judgment upon the verdict of the jury.

5. The District Court erred in denying appellants' Motion for a New Trial.

SUMMARY OF ARGUMENT

1. The District Court in a diversity case assumes all functions of the highest State appellate court, and thus has a duty to determine how that appellate court would decide the matter in issue.

2. The Washington State Supreme Court would, without substantial doubt, hold that the issue of implied warranty, and the breach thereof, should have gone to the jury.

3. The Washington State Supreme Court would so decide because

(1) The present-day trend toward abolition of the privity requirement and the invoking of warranty-based liability is overwhelming;

(2) Cases from several jurisdictions have predicated liability upon breaches of warranty with respect to bottles containing foodstuffs;

(3) The interrelationship between a foodstuff and the container in which it is packaged is close and logically indistinguishable; and

(4) The Washington State Supreme Court has consistently extended the common law warranty of fitness and suitablity to products other than foodstuffs.

4. The failure to submit the warranty issue to the jury substantially prejudiced appellants by casting upon them the burden of showing appellee's negligence—a burden which an action based upon a breach of warranty does not require.

ARGUMENT

I. A Federal Court in a Diversity Case Sits as the Highest State Court

Appellants submit it to be axiomatic that a Federal court in a diversity case assumes all functions of the highest State appellate court. *Wehrman v. Conklin,* 155 U.S. 314, 324, 15 S.Ct. 129, 39 L.Ed. 167 (1894), is one of the innumerable cases supporting the stated axiom. Consequently, it is the duty of the Federal court to determine how the highest State appellate court would decide the matter in issue. *Meredith v. City of Winterhaven*, 320 U.S. 229, 64 S.Ct. 7, 88 L.Ed. 9 (1943). The duty attaches even though the question as to State law is novel. *Standard Accident Insurance Co. v. Leslie*, 55 F. Supp. 134 (D. Ill., 1944); *Versluis v. Town of Haskell*, 154 F.2d 935 (10 Cir., 1946).

II. The Washington State Supreme Court Would Decree That the Warranty Issue Should Have Been Submitted to the Jury

Research indicates that the issue of warranty application to a bottle in which a foodstuff is packaged has never been presented to the Washington State Supreme Court. However, appellants assert that that court, without substantial doubt, would hold that the issue of implied warranty and the alleged breach thereof, should have gone to the jury.

Appellants' assertion is based upon (1) the strong judicial trend toward invoking warranty-based liability, (2) cases from other jurisdictions holding bottlers liable for breaches of warranties with respect to containers in which products are sold, (3) the logically indistinguishable relationship between a foodstuff and the bottle in which it is packaged, and (4) the consistent extension by the Washington State Supreme Court of the common law warranty of fitness and suitability to products other than foodstuffs.

III. The Judicial Extension of Warranty-Based Liability

As so aptly summarized by Dean William L. Prosser in his article, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L. Rev. 791 (1966), the courts of this nation have consistently extended the doctrine of implied warranty in invoking liability upon manufacturers, or other processors, in favor of ultimate consumers of a variety of processed articles. The extension of such liability has been predicated upon broad-scale judicial abolition of privity requirements.

This clearly recognizable trend toward strict liability to the consumer has been codified by the American Law Institute in its Second Restatement of Torts, Section 402 (A) which reads as follows:

> "§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> > "(a) the seller is engaged in the business of selling such a product, and
> >
> > "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
>
> "(2) *The rule stated in Subsection* (1) *applies although*
>
> > "(a) the seller has exercised all possible care in the preparation and sale of his product, and
> >
> > "(b) *the user or consumer has not bought the product from or entered into any contractual relation with the seller.*" (Emphasis supplied)

The many examples of cases holding a manufacturer, or other processor, liable to a consumer because of breach of warranty include *Goldberg v. Rollsman Instrument Corp.*, 191 N.E.2d 81-82 (N.Y., 1963), a holding by New York's highest appellate court that an action by the personal representative of a deceased airline passenger would lie against the airplane manufacturer, wherein the court stated:

> "The question now to be answered is: does a manufacturer's implied warranty of fitness on his product for its contemplated use run in favor of all its intended users, despite lack of privity of contract?
>
> "The *Randy Knitwear* opinion (11 N.Y.2d p. 16, 226 N.Y.S.2d p. 370, 181 N.E.2d p. 404) at least suggested that *all requirements or privity have been dispensed with in our State.* That is the immediate, or at least the logical and necessary result of our decision. . . . (Emphasis supplied)
>
> "A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the vender or manufacturer.
>
> "As we all know, a number of courts outside New York State have for the best of reasons dispensed with the privity requirement. . . ."

Similarly, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), holds that an automobile purchaser, injured because of a defective steering mechanism, could sue the auto manufacturer directly despite the lack of privity. *Santor v. A and M Karagheusian*, 207 A.2d 305 (N.J. 1965), expanded the *Henningsen* holding beyond personal injury cases stating:

> ". . . we hold that plaintiff, as ultimate purchaser, may maintain his action directly against the defendant manufacturer . . . for breach of its implied warranty of reasonable fitness. We hold, also, that *privity of contract between them is not necessary* and that such action may be prosecuted even though plaintiff's damage is limited to loss of value of the carpeting."

In the same context, *Inglis v. American Motors Corp.*, 209 N.E.2d 583, 585 (Ohio, 1965), in holding that an action would lie by the purchaser of an automobile against its manufacturer for damages measurable by the difference between the actual value of the auto and the value the market would have attached to the auto had various representations of the manufacturer been true rather than false, stated:

> ". . . *in the recent past the courts of many jurisdictions, in an endeavor to achieve justice for the ultimate consumer, have imposed an implied warranty of reasonable fitness on the person responsible for the existence of the article and the origin of the marketing process.* From the standpoint of principle, we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer where the defectively-made product has caused personal injury, and not actionable when inadequate manufacture has put a worthless article in the hands of an innocent purchaser who has paid the required price for it." (Emphasis supplied)

Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965), is in accord.

IV. Cases Predicating Liability Upon Breaches of Warranty With Respect to Bottles

The question whether an implied warranty attaches to a bottle or other container in which the product is packaged has been presented to courts of many jurisdictions. Those cases are collated in 81 A.L.R.2d 229 ("Liability of Manufacturer or Seller of Product Sold in Container Or Package for Injury Caused By Container or Packaging").

The majority of jurisdictions deciding the question have held the warranty doctrine applicable where, as in the instant case, there is evidence indicating that the container became defective while in the custody or control of the bottler or other processor.

Cases holding that the bottler, or other packager, warrants the fitness and suitability of the container in which a product is sold include *Florida Coca-Cola Bottling Co. v. Jordan,* 62 So.2d 910 (Fla., 1953); *Canada Dry Bottling Co. v. Shaw,* 118 So.2d 840 (Fla. App., 1960); *Renninger v. Foremost Dairies, Inc.,* 171 So.2d 602 (Fla. App., 1965); *Mead v. Coca-Cola Bottling Co.,* 108 N.E.2d 757 (Mass. 1952); *Hadley v. Hillcrest Dairy, Inc.,* 171 N.E. 2d 393 (Mass., 1961); *Mahoney v. Shaker Square Beverages,* 102 N.E.2d 281 (Ohio, 1951); *Geddling v. March,* 1 K.B. 668 (England, 1920); *Vallis v. Canada Dry Ginger Ale, Inc.,* 11 Cal. Reptr. 823, 190 Cal. App.2d 35 (Cal. App., 1961); *Jones v. Burgermeister Brewing Corp.,* 18 Cal. Reptr. 311, 198 Cal. App.2d 198 (Cal. App., 1962); *Vassallo v. Sabatte Land Co.,* 27 Cal. Reptr. 814, 212 Cal. App.2d 11 (Cal. App., 1963); *Faucette v. Lucky Stores, Inc.,* 33 Cal. Reptr. 215, 219 Cal. App.2d 196 (Cal. App., 1963).

In *Canada Dry Bottling Co. v. Shaw,* 118 So.2d 840, 842, *supra,* the court, in holding both the retailer and the bottler liable because of breaches of warranty for damages sustained by a purchaser injured when attempting to open a bottle, states:

> "While this court would not, at this time, extend the doctrine of implied warranty to all containers of food, in this case the bottle and its contents are so closely related that it is difficult—if not impossible—to draw a distinction."

The court further commented, at 118 So.2d 843, that no notice of a breach of warranty need be given the botttler because

> "It is universally known that when one purchases a bottle of Canada Dry Club Soda, it will be opened preparatory to use."

Parenthetically, it is noted that the Florida Supreme Court, in *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), a case arising from the breakage of a glass container in which reducing pills were sold, disapproved *Canada Dry Bottling Co. v. Shaw*, to the extent that warranty-based liability was imposed upon the *retailer.*

However, the *Foley* case is a reaffirmation of the principle that *a bottler* impliedly warrants the fitness of the container. Thus, at 177 So.2d 229, the court stated:

> "It is obvious that the *bottler* is in a position equivalent to that of a *manufacturer* of a product; and our holding in the *Florida Coca-Cola Bottling Co.* case (*Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910, *supra*) is in accord with the modern trend of authority in this country." (Citing 81 A.L.R.2d 229.)

Moreover, in *Renninger v. Foremost Dairies, Inc.*, 171 So.2d 602, 604, *supra*, a remand to the trial court directing that judgment for the plaintiff be entered upon a jury verdict, it is stated:

> "In *Canada Dry Bottling Co. v. Shaw*, Fla. App. 1960, 118 So.2d 840, it was recognized that the implied warranty of fitness may include the container or bottle in which the product is offered for sale. Accordingly, the purchaser of a bottle of milk is entitled to rely on the bottler to the extent that the container in which the product is packaged will be reasonably fit for the purpose for which it was intended."

Appellants submit that the distinction made by the

Florida courts between a bottler and a retailer is valid. The retailer is in no better position to discover a defective container than is the purchaser or consumer. However, essential fairness and practicality decrees that the bottler, as in the instant case, bear the prime responsibility for assuring the fitness and suitability of the containers which it places in the channels of commerce.

Thus, where as in the instant case there is evidence probative of a defect in a bottle, the existence of the defect prior to the bottle leaving the bottler's control, and normal handling of the bottle thereafter, appellants respectfully submit that the question of a breach of warranty by the bottler should be decided by the trier of the facts.

Mead v. Coca-Cola Bottling Co., 108 N.E.2d 757, 758, *supra*, supports appellants' assertion. There, the Massachusetts court, in affirming judgment against a bottler for a plaintiff who had sustained injuries while opening a bottle of beverage purchased from a vending machine, stated:

> "The evidence was sufficient to warrant a finding that the bottle was handled by the plaintiff in a manner to be expected by the seller of the beverage and that the bottle was defective."

V. A Warranty as to a Foodstuff Must Logically Extend to the Container in Which It Is Packaged

The Washington State Supreme Court has consistently stated that a common law warranty of fitness and suitability applies, *regardless of privity*, to the sale of foodstuffs. *Mazetti v. Armour*, 75 Wash. 622, 135 Pac. 633 (1913); *Nelson v. West Coast Dairy*, 5 Wn.2d 284, 105

P.2d 76 (1940); *Guisness v. Scow Bay Packing Co.*, 16 Wn.2d 1, 132 P.2d 740 (1942); *LaHue v. Coca-Cola Bottling, Inc.*, 50 Wn.2d 645, 314 P.2d 421 (1957).

Appellants submit that the relationship between a foodstuff and the bottle in which it is packaged is so intertwined that it would be completely illogical to invoke a warranty as to the foodstuff and withhold the warranty protection to the consumer where a defective bottle, rather than the foodstuff in the bottle, causes the damage. As expressly recognized in *Canada Dry Bottling Co. v. Shaw*, 118 So.2d 840, 842, *supra*, and implicitly recognized in the other cases hereinbefore cited, any attempt to draw a distinction between a foodstuff and its container, in cases of this nature, is illogical.

The bottler, at the time it places a commodity upon the market, knows not only that the beverage will be consumed, but that the bottle will be opened preparatory to such consumption. The consumer's injuries from a broken bottle are just as foreseeable as those resulting from the bottle's contaminated contents.

VI. The Policy of the Washington State Supreme Court Is to Extend the Common Law Warranty of Fitness and Suitability

Freeman v. Navarre, 47 Wn.2d 760, 767, 289 P.2d 1015 (1955), an *en banc* decision of the Washington State Supreme Court, clearly indicates the policy toward abolition of the privity requirement and the extension of warranty-based liability in stating:

> ". . . it appears that a realistic, judicial analysis and reappraisal of the privity rule would be quite appropriate. However, that may be, such a reap-

praisal is unnecessary for the disposition of the appeal in the case at bar."

Two subsequently decided decisions by the Washington court substantiate the implementation of a policy of extending the warranty doctrine. Thus, *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 354-355, 378 P.2d 298 (1963), states:

> "As heretofore indicated, implied warranties of fitness and merchantability by a manufacturer, where found in the absence of privity, arise from the common law. *LaHue v. Coca-Cola Bottling, Inc., supra. We have,* since the time of *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913), *imposed upon manufacturers of food products common-law implied warranties of merchantability and fitness despite lack of privity.*
>
> "In *Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848, we applied an implied warranty of fitness for purpose (R.C.W. 63.04.160(1)) to a retail sale of clothing, *one of the premises being that no sound distinction could be drawn between a harmful product taken internally, i.e., food, and wearing apparel meant to be worn next to the skin.* By the same token, it would appear to us, no such distinction could be drawn as to a cosmetic intended to be applied to the hair, scalp or skin.
>
> "*We conclude the trial court did not err in imposing a common-law implied warranty of merchantability upon defendant manufacturer.*" (Emphasis supplied)

Appellants submit that the Washington State Supreme Court would also find no sound logical distinction between a foodstuff and the bottle in which it is packaged.

Similarly, in *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 190-193, 401 P.2d 844 (1965), the Washington State Supreme Court recognized and approved the trend toward expansion and extension of the warranty doctrine. Thus, the court stated:

> "The right of an injured person to recover from a manufacturer or retailer for breach of implied warranty in the absence of privity of contract presents what might well be described as the Sargasso Sea of the law. It is filled with entangling theories, rules and doctrines from which courts throughout the United States and England have been atttempting to extricate themselves for decades. Since 1842, when the Court of Exchequer decided the case of *Winterbottom v. Wright,* 10 M. & W. 109, 152 Eng. Rep. 402, *the law has been constantly developing and growing as it keeps pace with changing social philosophy and expanding methods of manufacturing and distribution. There is a certain and steady trend in the direction of fixing greater responsibility in manufacturers and sellers.* Prossers on Torts ch. 19, p. 658, *et seq.* (3d ed.). (Emphasis supplied)
>
> . . .
>
> "In fairness to the trial judge who reluctantly felt constrained to dismiss the case following opening statement of counsel, *it must be recognized that we are now dealing with new vistas in the field of implied warranty.*" (Emphasis supplied)

VII. The Failure to Submit the Warranty Issued to the Jury Substantially Prejudiced Appellants By Casting Upon Them the Burden of Showing Appellee's Negligence — a Burden Which an Action Based Upon a Breach of Warranty Does Not Require

It is axiomatic that a plaintiff is not required to establish a defendant's negligence in order to recover for a breach of an implied warranty. *Lundquist v. Coca-Cola Bottling, Inc.,* 42 Wn.2d 170, 254 P.2d 488 (1953); *Frisken v. Art Strand Floor Covering, Inc.,* 47 Wn.2d 587, 592, 288 P.2d 1087 (1955).

Thus, the District Court in the instant case, by failing to submit to the jury appellant's cause of action based upon a breach of warranty, prejudicially imposed upon appellant a burden of proof beyond that which would have been required had the warranty action properly gone to the jury.

The prejudice to appellant inherent in the imposition of the additional burden of proof is compounded because any evidence of appellee's specific negligence is peculiarly within its exclusive knowledge and control.

As there is utterly no way of tracing the progress through appellee's bottling plant of the specific bottle which caused injury to appellant Margie J. Elliott, the burden of establishing negligence with respect to that particular bottle is almost insuperable.

Appellant submits that the overwhelming trend toward imposition of warranty-based liability constitutes a judicial recognition that evidence of a manufacturer's negligence almost universally lies solely within its knowledge, that the manufacturer (or other processor) is in a far better position to inspect its products and remedy any defects therein than is any other entity encountering the product in the channels of commerce, and that, accordingly, justice and practical necessity require that the entity placing a product in the marketplace impliedly warrants the fitness and suitability of the product *and the container in which it is packaged.*

CONCLUSIONS

Appellants offered credible proof that the bottle in question was defective before leaving appellee's premises; that the defective condition of the bottle was observable to appellee; that the bottle was not physically abused after leaving appellee's control; and that appellant Margie J. Elliott sustained serious injuries as a direct result of the bottle's fragmentation because of the pre-existent defects.

Appellants submit that the Washington State Supreme Court, confronted with such proof, would manifestly decree that the question whether appellee breached an im-implied warranty of fitness and suitability should have gone to the jury.

Appellants respectfully request only that this case be submitted to a jury under proper instructions as to appellee's implied warranty.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert O. Wells, Jr.
of Attorneys for Appellant

APPENDIX A

Table of Exhibits

Plaintiffs' Exhibit	*Marked*	*Received in Evidence*
1	26	28
2	29	30
3	67	123
4	155	157
5	198	199

Defendant's Exhibit	*Marked*	*Received in Evidence*
A-1	241	245
A-2	241	245
A-3	241	245
A-4	241	245
A-5	241	245
A-6	241	245
A-7	241	245
A-8	255	257
A-9	255	258
A-10	260	261
A-11	300	312
A-12	301	312
A-13	303	312
A-14	310	312

No. 22120

IN THE

United States Court of Appeals
For the Ninth Circuit

Margie J. Elliott and Lon Elliott,
wife and husband,
Appellants,

v.

Alpac Corporation, a Nevada Corporation,
d/b/a Glaser Beverages,
Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLEE

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IN THE

United States Court of Appeals
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MARGIE J. ELLIOTT and LON ELLIOTT,
wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

Appellee deems it necessary that it enlarge upon the statement of the case set forth in appellants' brief, for purposes of clarity and completeness.

The only evidence presented by appellants in support of their contentions of negligence and/or breach of warranty consisted of the testimony of their expert, Mr. C. V. Smith.

It is, in part, appellee's contention on this appeal that appellants' evidence was legally insufficient to warrant submission to the jury of the issue of alleged breach of implied warranty and, accordingly, it is believed necessary to critically examine Mr. Smith's testimony, his opinions, and the predicate for his stated opinions.

Mr. Smith testified that there were "scratches" on the neck of the bottle (Ex. 2), and that such "scratches", in his judgment, were deep enough to cause a weakness in the glass (Tr. 144). He stated, however, that he could not say what had caused the "scratches" (Tr. 147); he conceded that the "scratches" he observed were from an area of the bottle not involved in the fracture (Tr. 165); and he did not know whether there were such "scratches" in the area where the fracture occurred (Tr. 165-166). He stated that he had made no attempt to reproduce such "scratches" on other bottles and he had made no test to determine if such "scratches" in fact produced a weakness in the bottle (Tr. 167).

Ultimately, Mr. Smith's opinion that the bottle was defective at the time it left appellee's control was predicated upon his opinion (which is quoted at page 4 of Appellants' Brief) that the defect in the bottle, which caused the fracture, resulted from the capping operation employed by appellee (Tr. 159-160). He stated elsewhere that the final cause of the fracture was "the capping device as it came down and crimped the cap" (Tr. 167). Mr. Smith further advised that when he referred to "crimping the cap" by the capping machine, he was referring to a mechanism employed in the bottling process "that puts the little marks around the edge" of the cap—"the little indentations that are put in by the ends of the fingers of the crimping machine" (Tr. 168). The "crimping machine", he elaborated, is the mechanism which puts the cap on the bottle and after it puts the cap on "the fingers" of the machine squeeze the sides of the cap against the bottle (Tr. 168). He again affirmed that it was the action of the "crimping machine" which caused the bottle (Ex. 2) to fracture (Tr. 168).

Mr. Smith expressed certainty that there was such a "claw like mechanism" which is used to put caps on bottles and which squeezes the sides of the cap against the bottle (Tr. 175). He did concede that he was unfamiliar with the nature and extent of the forces applied to a bottle during a capping operation (Tr. 173-175). As he put it: "No, I don't know the exact forces that are on crimping claws" (Tr. 173). Most significantly, Mr. Smith stated that he was familiar with the details of appellee's bottling process "in basic principle only," and he conceded that he had not been in appellee's plant within the last ten years (Tr. 167).

In point of fact, it was established by the evidence that Mr. Smith's visualization of what occurred during the bottling process employed by appellee was grossly inaccurate.

The evidence established that appellee's bottling process operates in the following manner: Used bottles are brought into the plant from the trade. They are first visually inspected for debris and defects (Tr. 246). The bottles are then mechanically taken from the case by a "climax unloader", which operates by rubber caps being fitted over the top of the bottles and suction being applied to secure them (Tr. 246-247; Ex. A-1). Then the bottles are moved mechanically to the washer and after being thoroughly cleaned are placed mechanically on a conveyor chain (Ex. A-1, A-2; Tr. 248). As the bottles leave the washer they are again inspected visually for defects and debris against a backdrop of bright, fluorescent lighting (Ex. A-2; Tr. 248). Following that, the bottles are passed through an electronic inspector which scans them for debris and automatically rejects unsuitable containers (Ex. A-3; Tr. 249-250). The bottles then go to the filler machine (Ex. A-4 desig. "F"; Tr. 250-251), and then on to the capping machine (Ex. A-5, desig. "C"; Tr. 251). As the bottles pass through the filler machine "vent tubes" are automatically fed into the top of each bottle and an air-tight seal is effected by a gasket at the upper end of the "vent tubes". Once the seal is complete, the "vent tubes" inject into the bottles a counter pressure equal to 1½ times the pressure that the bottle will contain after filling and capping. The counter pressure serves two purposes: If a bottle is structurally weak, it will be exploded by the pressure; and, it would not be possible to fill the bottles with carbonated beverages without the pressure inside the bottle being equivalent to the pressure of the carbonated liquid (Tr. 252, 253, 254, 336, 337).

When thus filled the bottles pass to the capping machine which consists of twelve crowning heads (Ex. A-7, desig. "head"; Tr. 254, 255). The part of the machine which actually places the cap or crown on the bottles is called a "flexible throat" (Ex. A-8; Tr. 255). Exhibit A-8 is the type of "flexible throat" that has been in use in appellee's plant for many years (Tr. 256, 340). The bottle caps are fed into the crowning head from a "cap chute" (Ex. A-6; Tr. 257).

The bottle caps are not manufactured by appellee. As manufactured they are identical in appearance to the caps contained in Ex. A-9. That is, the edges of the caps are crimped in the cap manufacturing process. There is no mechanism in appellee's bottling process which puts crimps in the caps (Ex. A-9; Tr. 257-260, 342, 343). The caps are fed from the "cap chute" into the crowning head and are then affixed to the bottles by the crowning throat (Ex. A-8; Tr. 264, 265). There are absolutely no "claws" which grip the cap and squeeze it against the edges of the bottle in the capping process (Tr. 265, 266, 343).

The crowning throat (Ex. A-8) does not apply pressure against the sides of the bottle in the capping process. The throat is constructed with a bevel—the inside diameter is greater at the bottom than at the top—which has the effect of flattening the skirt of the cap (Ex. A-9) against the bottle neck as the throat is driven down over the cap. The throat is designated a "flexible throat" because it is designed to expand slightly as it is forced down over the cap. The throat at no time contracts against the cap (Tr. 275-280, 338-342).

The witness, Mr. Duncan, demonstrated in open court how the crowning throat operates. Before the jury, he placed a cap from Exhibit A-9 on a bottle (Ex. A-10) and after seating the crowning throat over the cap, struck the throat with his hand until the cap was seated on Exhibit A-10 (Tr. 281). It is to be noted that the bottle, Exhibit A-10, has markings along its neck which are identical to those on Exhibit 2 which Mr. Smith described as "scratches".

When the crowning throat is driven down over the cap the bottles are subjected to between 400 and 800 pounds pressure (Tr. 267, 340).

What appellants' witness, Mr. Smith, described as "scratches" on Exhibit 2 are not "scratches" at all, but are marks left on bottles as a result of the molding process, and such marks in no way affect the structural integrity of a bottle (Tr. 269, 316, 349, 350).

Appellant wife testified that the bottle fractured as she was attempting to open it with a standard bottle opener, Exhibit 1. All witnesses including appellants' expert Mr. Smith, agreed that the cap showed no evidence of being loosened and no evidence that the opener, Exhibit 1, had ever been applied to it (Tr. 149, 169, 170, 346, 298). The evidence further was that in using an opener such as Exhibit No. 1 to open Exhibit 2 no more than 25 pounds pressure would be applied to the cap, and that since there was no physical evidence that such an opener had, in fact, been used, appellant wife could have applied no more than three to four pounds pressure before the fracture was produced, accepting her version of the incident as factual (Tr. 171, 346).

The evidence further established that a bottle having such a defect that it would fracture upon the application of the force applied by appellant wife, could not possibly have passed through appellee's bottling process: Such a bottle would have been exploded by the counter pressure of the filler machine or by the 400 to 800 pounds pressure of the capping machine (Tr. 320, 344, 345).

Appellee's evidence as to the cause of the fracture was presented through the testimony of Dr. Kirk, a Professor of "Criminalistics" at the University of California, Berkeley, who is highly qualified in the scientific evaluation of physical evidence and has performed considerable scientific work in the areas of glass and glass fractures (Tr. 282, 283, 284). On examination of Exhibit 2, Dr. Kirk found that there was an area of extensive cracking beneath the bottle cap; that the fracture of the bottle emanated from that area of crushed glass; that the area of crushed glass was directly beneath a crimp in the cap, which crimp is located directly beneath the letter "L" of the word "Glaser"; that the prong immediately adjacent to such crimp had been deformed by a force directed upward and inward against the neck of the bottle; and, that the side of the cap directly opposite the referred prong and crimp showed a series of markings which were indicative of the application of some kind of tool or device to the cap (Tr. 290-294; Ex. A-12, A-13, A-14). On the basis of such physical evidence, Dr. Kirk concluded that the defect and fracture were caused by some type of tool which employed a pinching-type action and which had been used in an unsuccessful attempt to open the bottle. He stated that his opinion was predicated on the fact that there was a direct correlation between the bent prong, which had been pinched upward and inward against the neck of the bottle, and the point of fracture, together with the fact that the opposite side of the cap showed evidence of the application of some kind of improper tool (Tr. 317). Dr. Kirk further testified that the referred physical damage to the cap could not have been caused by the appellee's capping machine (Tr. 321).

ARGUMENT IN ANSWER TO APPELLANT

Appellants Failed to Produce Legally Sufficient Evidence to Warrant Submission of the Issue of Warranty to the Jury

It is the established law that even where liability is predicated upon an alleged breach of implied warranty, the plaintiff is not relieved of his burden of proof, and it is universally held that in fulfilling that burden plaintiff must establish, *inter alia,* that the alleged defect existed in the product at the time it left the hands of the defendant. Prosser, Law of Torts, 3rd Ed., Ch. 19, pages 683, 684; *Williams v. Paducah Coca Cola Bottling Company,* 343 Ill. App. 1, 98 N.E.2d 164 (1951); *Tiffin v. Great A&P Tea Company,* 20 Ill. App.2d 421, 156 N.E.2d 249 affirm 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Cudahy Packing Company v. Baskin,* 170 Miss. 834, 155 So. 217 (1934); *Kruper v. Proctor & Gamble Company,* 160 Ohio St. 489, 117 N.E.2d 7 (1954).

The only evidence submitted on this key issue by appellants was the opinion testimony of Mr. C. V. Smith. Mr. Smith, it is true, testified that *in his opinion* the defect which caused the bottle to fracture was brought about by the capping operation at appellee's bottling plant (Tr. 159, 160). It is, however, essential to examine the basis for Mr. Smith's stated opinion in determining whether that opinion constitutes substantial evidence of the fact stated.

As has been pointed out in appellee's statement of the case, Mr. Smith testified that (1) the defect resulted from the capping operation (Tr. 159, 160); (2) the cause of the fracture was "the capping device as it came down and crimped the cap" (Tr. 167); (3) the "crimping" he referred to was produced by a mechanism in the bottling process "that puts the little marks around the edge" of the cap—"the little indentations that are put in by the ends of the fingers of the crimping machine" (Tr. 168); (4) the "crimping machine" is a mechanism which puts the cap on the bottle and after it puts the cap on "the fingers" of the machine squeeze the sides of the cap against the bottle (Tr. 168); (5) that the "crimping machine" consists of a "claw-like mechanism" which is used to put a cap on a bottle and which squeezes the sides of the cap against the bottle (Tr. 175).

While Mr. Smith stated it to be his opinion that the defect in question was created by the "claw-like" crimping machine, appellants produced no evidence that appellee, in fact, used a "claw-like" mechanism in its bottling or capping operation. Mr. Smith's testimony certainly did not constitute evidence of such fact: he stated that he was familiar with appellee's bottling process "in basic principle only," and he admitted that he had not been in appellee's plant and personally observed the operation for ten years (Tr. 167).

The only basis then for Mr. Smith's stated opinion was that he believed that appellee's capping operation consisted of a "claw-like" mechanism which squeezed the cap against the bottle. While not so phrased by Mr. Smith, his testimony has precisely the same effect as though he had stated: "I don't know how the capping operation is carried out, but if it is carried out by a 'claw-like' mechanism which squeezes the cap against the bottle, then, in my opinion, the defect would have been caused by the 'claw-like' mechanism."

The whole basis, then, for Mr. Smith's opinion is his assumption of a supposititious fact—that the bottle was capped by means of a "crimping machine", a "claw-like" mechanism which squeezes the cap against the bottle—and there is no substantial evidence from which a jury could conclude that such a "claw-like crimping machine" in fact existed.

We may go further than that and state that not only was there no evidence in the case establishing the predicate for Mr. Smith's opinion, but that the only evidence in the case was definitely contrary thereto.

It was established by appellee's witnesses, Mr. Duncan, the plant superintendent, and Mr. Alger, who designed and installed the bottling equipment that (1) the mechanism which caps the bottles is known as a "flexible throat" (Tr. 255); (2) there are absolutely no "claws" or "fingers" which grip the cap and squeeze it against the sides of the bottle (Tr. 265, 266, 344); (3) the "flexible throat" does not apply pressure against the sides of the bottle in the capping process (Tr. 275 to 280, 338 to 342); (4) there is no mechanism in appellee's bottling process which puts the "crimp" in the bottle cap, such "crimps" being a part of the cap manufacturing process (Tr. 257, 260, 342, 343; Ex. A-9).

To summarize: The appellants, in order to create a question of fact on the issue of implied warranty, were required to prove that the defect existed at the time the bottle, Exhibit 2, passed from appellee's control; the only evidence submitted on such issue was the opinion evidence of Mr. Smith; Mr. Smith's opinion that the defect was caused by the capping operation is predicated upon his *surmise* that such operation is carried out by a "claw-like" mechanism which presses the cap against the bottle; and, the only evidence in the case established that there was, in fact, no such mechanism in existence at appellee's plant.

It is the settled rule of law in Washington that a mere scintilla of evidence is not sufficient to create a question of fact on a disputed issue. Jury verdicts may not rest on speculation or conjecture but must be supported by substantial evidence. *Thompson v. Virginia Mason Hospital,* 152 Wash. 297, 277 Pac. 691; *Geisness v. Scow Bay Packing Company,* 16 Wn.2d 1, 132 P.2d 740; *Home Insurance Company v. Northern Pacific Railway,* 18 Wn.2d 798, 140 P.2d 507; *Neel v. Henne,* 30 Wn.2d 24, 190 P.2d 775; *Reusch v. Ford Motor Company,* 196 Wash. 213, 82 P.2d 556; *Prentice v. United Pacific Insurance Company,* 5 Wn.2d 144, 106 P.2d 314.

In the case last cited, plaintiff sought recovery on a policy of insurance for loss sustained as the result of the bursting of an ammonia pipe in plaintiff's cold storage plant. The coverage afforded plaintiff under its policy of insurance was such that only a bursting of the pipe by reason of pressures created by the refrigerant would afford plaintiff a recovery. A verdict and judgment in favor of plaintiff was reversed on appeal. Judge Steinert delivered the court's opinion and stated of the plaintiff's evidence, as follows:

> "In the final analysis, respondent's case hangs upon the evidence of its expert witnesses. The logic of their testimony is simply this: the pressure of the refrigerant could have caused the rupture if the pipe were worn to a thinness of approximately one ten

> thousandths of an inch; the rupture did occur; therefore, the pipe must have been worn to the required point. This, however, is but reasoning in a circle. It assumes a fact necessary to establish a cause of action, but concerning which assumed fact there is no evidence, and then imploys the supposititious fact as the basis for a conjecture as to the possible cause of a particular physical result.
>
> "In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture."
>
> * * * * * * * * * *
>
> "In the case at bar, there is no evidence of any known facts pointing to, or consistent with, the theory that the pipe had become worn to a thinness of one ten thousandths of an inch and then had been broken by pressure from within. It is the case of indulging in a presumption in order to support a conjecture. Presumptions may not be pyramided upon presumptions nor inference upon inference.
>
> "We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown."

The cited case presents a striking parallel with the instant situation. Mr. Smith, who had no personal knowledge concerning the equipment actually used by appellee to bottle beverages, assumed that there was a "claw-like" mechanism which gripped the cap and pressed it against the sides of the bottle, and he then opined that the pressure from the "claw-like" mechanism had caused the defect which existed in Exhibit 2. This, as stated in the quoted case, is but reasoning in a circle: there was no evidence to support Mr. Smith's assumption that such a "claw-like" mechanism, in fact, existed.

It is further the law in this jurisdiction that where the opinion of an expert witness is predicated upon an assumption of fact which has no basis in the evidence or which is contrary to the only evidence in the case, the opinion is of no value and does not constitute substantial evidence on a point at issue. *Hagen v. City of Seattle*, 54 Wn.2d 218, 339 P.2d 79.

Appellants failed to produce substantial evidence that the defect in the bottle existed at the time it passed from appellee's control. As it was appellants' burden to produce substantial competent evidence on that issue in order to create a question of fact for the jury's consideration on the issue of implied warranty, it was not error for the trial court to refuse to instruct the jury on such issue.

The Instructions Requested by Appellants on the Issue of Implied Warranty did not Accurately State the Law, Were Confusing and Misleading, and It Was Therefore not Error for the Trial Court to Refuse to so Instruct the Jury

Appellants complain that the trial court erred in refusing to instruct the jury in accordance with their written requests, as follows:

Proposed Instruction No. 3:

> "The defendant, as a bottler of foodstuffs, impliedly warranted to the plaintiff and other customers of its products that the bottles in which its product was sold were reasonably fit for the purpose for which they were intended.
>
> "If you find that the bottle which broke in plaintiff's hand was defective to the extent that it was not reasonably fit for use as a bottle for the soft drink, that the defect was present before the bottle left the defendant's control, and that the defect caused plain-

tiff's injuries, your verdict must be for the plaintiff.

> "Negligence is not an element of required proof when recovery is sought for breach of a warranty, *and no evidence is necessary to establish recovery for a breach of warranty.*" (Italics ours.)

Proposed Instruction No. 12:

> "It is not necessary that plaintiff prove both the defendant's negligence and a breach of warranty. If you find either that the defendant was negligent in one or more respects, or that the defendant breached a warranty, and that such negligence or breach of warranty caused plaintiff's injuries your verdict shall be for the plaintiff."

As has been stated above, the fact that a manufacturer is liable on the basis of implied warranty does not render the manufacturer an insurer of the condition of the product nor does such fact dispense with the plaintiff's burden of proof. The plaintiff, in an action predicated upon breach of implied warranty, has the burden of proving that the injury was caused by a defect in the product and that the defect existed in the product when it left the hands of the manufacturer. Prosser on Torts, 3rd Ed., Ch. 19, pages 683, 684; *Williams v. Paducah Coca Cola Bottling Company,* 343 Ill. App. 1, 98 N.W.2d 1964 (1951); *Tiffin v. Great A&P Tea Company,* 20 Ill. App.2d 421, 156 N.E.2d 249, affirm 1959, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Cudahy Packing Company v. Baskin,* 170 Miss. 834, 155 So. 217 (1934); *Kruper v. Proctor & Gamble Company,* 160 Ohio St. 489, 117 N.E.2d 7 (1954).

The last paragraph of proposed Instruction No. 3, then, is clearly erroneous, since it informs the jury that "no evidence is necessary to establish recovery for a breach of warranty." The error is further not cured by the second paragraph of the proposed instruction. That paragraph does not state that no recovery could be had on the basis of breach of warranty unless the jury found (1) that the bottle was not reasonably fit, (2) that the defect existed before the bottle left defendant's control, and (3) that the defect caused plaintiff's injuries; the instruction states that the verdict "must be for plaintiff" if those facts are found. Further, that paragraph of the proposed instruction does not, in any way, refer to breach of warranty, and a jury might well conclude that the second and third paragraphs dealt with separate bases of recovery: that is, if they found the above enumerated facts in (1), (2) and (3) to have been proven, they were required to return a verdict for plaintiffs, but that, recovery on the basis of implied warranty might be had absent proof of those facts or any others. At best the proposed instruction was ambiguous and very likely would have confused the jury. It is submitted that had the proposed instruction been given, a verdict in favor of plaintiffs would have required reversal on the basis of the objectionable portions of Instruction No. 3.

Proposed Instruction No. 12 was also inadequate and the trial court did not err in refusing to give it. Standing alone, the instruction is objectionable because it fails to advise the jury of the proof that plaintiffs were required to make before recovery could be had on the basis of implied warranty. When presented to the jury in conjunction with proposed Instruction No. 3, it is, of course, tainted by the misleading and objectionable language of that instruction.

If a proposed instruction incorrectly states the law or is liable to confuse or mislead the jury, it is not error for the trial court to refuse to give such instruction, and it is well settled that the trial court is under no duty to rewrite such proposed instructions. *Wong v. Swier* (C.A. 9th), 267 F.2d 749; *Fidelity and Casualty Company of New York v. Manley* (C.A. 5th) 132 F.2d 127; *Ramm v. Hewitt-Lea Lumber Company,* 49 Wash. 263, 94 Pac. 1081; *Hanson v. Sandvik,* 128 Wash. 60, 222 Pac. 205; *Amann v. City of Tacoma,* 170 Wash. 296, 16 P.2d 601; *Krogh v. Pembla,* 50 Wn.2d 250, 310 P.2d 1069.

Accordingly, it was not error for the trial court to refuse to instruct the jury as requested by appellants, and as no proper instructions were prepared by appellants on the theory of implied warranty, the failure to instruct on that issue does not constitute reversible error.

There is no "Strong Judicial Trend" Toward Imposing Upon a Bottler Liability on the Basis of an Implied Warranty Where the Injured Party is not in Privity With the Bottler

Appellants contend that there is a "strong judicial trend" in the direction of imposing liability based on an implied warranty by the bottler of soft drink beverages where one not in privity with the bottler sustained injury by reason of a defect in a bottle. It is asserted by appellants at page 11 of their brief that "a majority of jurisdictions deciding the question" have held the bottler liable on the basis of implied warranty under such circumstances. At page 12 of appellant's brief, a number of cases are cited which appellants assert hold that "a bottler or other packager" warrants the fitness of the container in which the product is dispensed.

A review of the cases cited, however, reveals that only two, both from the State of Florida (*Canada Dry Bottling Company v. Shaw,* 118 So.2d 840 and *Renninger v. Foremost Dairies, Inc.,* 171 So.2d 602) in fact support appellants' principal thesis. In the case of *Florida Coca Cola Bottling Company v. Jordan, et al.,* 62 So.2d 910 (Fla. 1953), the plaintiff was allegedly injured upon swallowing a piece of broken glass which was contained in a beverage bottled by the defendant. There was, accordingly, no question presented under that case regarding the bottler's liability for defects in the container itself.

The case of *Mead v. Coca Cola Bottling Company,* 108 N.E.2d 757 (Mass. 1952) involved a situation in which the bottled beverage allegedly causing plaintiff's injury was purchased by plaintiff from a vending machine owned and maintained by the defendant. Accordingly, in that case there clearly was privity between the plaintiff and defendant, and the case is therefore not in point at all. The court there held, and properly so, that the plaintiff's purchase of the bottle from the defendant's vending machine constituted a sale within the meaning of a statute imposing liability upon the seller for the failure of the goods to be of merchantable quality.

The case of *Hadley v. Hillcrest Dairy, Inc.,* 171 N.E.2d 393 (Mass. 1961) is similarly not in point. In that case, there was a direct sale of the product in question from the defendant to the plaintiff. The court decided the case on the basis of the statutory implied warranty imposed upon the defendant by the Uniform Sales Act.

In the case of *Mahoney v. Shaker Square Beverages,* 102 N.E.2d 281 (Ohio 1951) plaintiff instituted an action against the retailer, not the bottler. The court there held (1) that the implied warranty of merchantability arising from the Uniform Sales Act applied to members of the purchaser's family (including servants), and (2) that the plaintiff also had a cause of action against the defendant retailer in negligence because of the latter's violation of the state's pure food statute. There again, there was privity between the plaintiff and the defendant and, in any event, the bottler of the beverage was not involved in the action.

In the case of *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Rptr. 823, 190 Cal. App.2d 35 (Cal. App. 1961) the court's decision turned on the implied warranty extended by the Uniform Sales Act, the principal question being whether such warranty extended to employees of a vendee. Here also there was privity between the plaintiff and defendant and accordingly the case is not in point.

The case of *Jones v. Burgermeister Brewing Corporation*, 18 Cal. Reptr. 311, 198 Cal. App.2d 198 (Cal. App. 1962) involved an appeal by the plaintiff from an adverse judgment in an action instituted against the defendant brewer and the defendant distributor of the bottled beverage. On appeal the plaintiff contended that the trial court should have instructed the jury on the theory of implied warranty as well as upon negligence. No contention was advanced by the defendant brewer on appeal that it could not be held liable on the basis of implied warranty to the plaintiff, and that issue was not directly considered or resolved by the court. Further, the opinion does not clearly state the relationship which existed between the defendant brewer and the defendant distributor and, depending upon the precise nature of that relationship, there could well have been privity between the defendant brewer and the plaintiff. The failure of the defendant brewer to raise the issue of its non-liability on the basis of implied warranty strongly suggests that there was no intervening sale of the product to the defendant distributor and that accordingly privity existed between the defendant brewer and the plaintiff.

In the case of *Vassallo v. Sabatte Land Company*, 27 Cal. Reptr. 814, 212 Cal. App.2d 11 (Cal. App. 1963) the plaintiff's action was instituted against the retailer who sold the product to the plaintiff. Privity existed, as in the other cases above cited, and the court's decision was based on the warranty imposed by the Uniform Sales Act.

In *Faucette v. Lucky Stores, Inc.*, 33 Cal. Rptr. 215, 219 Cal. App.2d 196 (Cal. App. 1963) the plaintiff brought action against both the defendant bottler and the defendant retailer, and the defendant retailer cross-claimed against the defendant bottler. The trial court dismissed the plaintiff's action against the bottler on the basis that there was no implied warranty running between the bottler and the plaintiff. The propriety of the trial court's ruling in that regard was not raised on appeal and the decision in no way stands for the proposition advanced by appellants.

It thus appears quite clear, contrary to appellants' assertion that only one jurisdiction, Florida, has declared that a bottler of beverages is liable on the basis of implied warranty, in the absence of privity, for injuries caused by defects in a bottle. It is submitted that a single decision of the Florida appellate court does not define "a strong judicial trend". There are, however, cases from other jurisdictions which expressly hold that a bottler is not liable on the basis of implied warranty in the absence of privity, for injuries caused by defects in a bottle. *Leggier v. Philadephia Coca Cola Bottling Company,* (1959 DC Pa) 171 Fed. Supp. 749; *Jax Beer v. Schaeffer* (1943 Tex. Civ. App.) 173 S.W.2d 285; *Latham v. Coca Cola Bottling Company,* (1943 Tex. Civ. App.) 175 S.W.2d 426; *Anheuser Bush, Inc. v. Butler,* (1944 Tex. Civ. App.) 180 S.W.2d 996.

It is the Settled Rule of Law in the State of Washington That There can be no Recovery Against a Manufacturer, on the Basis of Breach of Implied Warranty, in the Absence of Privity, the Only Exceptions to Such Rule Being in Cases Involving Food or Inherently Dangerous Products

Appellants assert that the Washington Supreme Court would hold "without substantial doubt" that the issue of appellee's liability on the basis of implied warranty should have been submitted to the jury in the case at bar. Significantly, no cases are cited by appellants in support of that proposition.

In fact, the established rule of law in the state of Washington is to the contrary.

It is true, as noted by appellants, that the Washington Supreme Court, since its decision in the case of *Mazetti v. Armour,* 75 Wash. 622, 135 Pac. 633 (1913), has consistently held that a manufacturer may be held liable on the basis of implied warranty, in the absence of privity, for injuries caused by *consumable* products, such as food, (*Nelson v. West Coast Dairy,* 5 Wn.2d 284, 105 P.2d 76 (1940); *Geisness v. Scow Bay Packing Company,* 16 Wn.2d 1, 132 P.2d 740 (1942); *LaHue v. Coca Cola Bottling, Inc.,* 50 Wn.2d 645, 314 P.2d 421, (1957)) and cosmetics (*Esborg v. Bailey Drug Company,* 61 Wn. 2d 347, 378 P.2d 298 (1963)). Other decisions of the Washington Court, however, which are concurrent with the last cited cases, make it clear, beyond cavil, that in the absence of contractual privity, no recovery may be had against a manufacturer *on the basis of implied warranty* for injuries caused by non-consumable products.

In *Foster v. Ford Motor Company,* 139 Wash. 341, 246 Pac. 945 (1926), which involved an allegedly defective tractor, the Washington Supreme Court reversed a judgment in plaintiff's favor stating (at page 350):

> "The third, *Mazetti v. Armour & Co.,* 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L.R.A. (N.S.) 213, was an action against the manufacturer for putting out poisonous food. A recovery was sustained.
>
> "It is, of course, apparent that these cases, involving explosives or poisonous substances, do not come under the rules applicable to articles which are imminently dangerous through defects in design or construction."

In *Reusch v. Ford Motor Company,* 196 Wash. 213, 82 P.2d 556 (1938), involving injuries allegedly sustained by reason of defendant's defective truck, the Washington Supreme Court held that recovery could only be had on proof of negligence and stated (at page 223):

> "The poisonous food cases are not analogous to the situation presented in the case at bar."

The case of *Murphy v. Plymouth Motor Corporation*, 3 Wn.2d 180, 100 P.2d 30 (1940), involved an action by the purchaser of an automobile against the manufacturer on the basis of implied warranty. The Washington Supreme Court held that there was no liability on the basis of implied warranty and in so doing stated (at page 184):

> "The doctrine of implied warranty with reference to the sale of patent medicines and prepared food products (*Matzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C 140, 48 L.R.A. (N.S.) 213 is not applicable to an automobile."

In *Dobbin v. Pacific Coast Coal Company*, 25 Wn.2d 190, 170 P.2d 642 (1946) plaintiff brought an action for damages allegedly suffered as the result of a defective furnace which had been manufactured by defendant but which was purchased by plaintiff from another party. Plaintiff's action, in part, was predicated on an alleged breach of implied warranty of fitness. The Washington Supreme Court there stated (at page 196):

> "The trial court rightly held, in its first memorandum opinion, that, since there was no privity whatever between the plaintiff and any of the defendants, the plaintiff could not recover against any of them on the theory of breach of warranty, express or implied, or any other conractual theory."

Thus, it is clear that the Washington Supreme Court has consistently held that a vendee of an allegedly defective product has no right of action against the manufacture of such product based on implied warranty in the absence of privity.

Appellants cite several Washington cases as support for the proposition that the Washington Supreme Court has clearly indicated "a policy toward abolition of the privity requirement and the extension of warranty-based liability." The cases cited do not, in fact, support the proposition advanced.

The case of *Freeman v. Navarre*, 47 Wn.2d 760, 289 P.2d 1015 (1955) was in no way concerned with a manufacturer's liability, in the absence of privity of contract, on the basis of implied warranty. The Supreme Court there simply affirmed that, in the absence of privity, a manufacturer may be held liable for its negligence. It is, in fact, tacit in the court's opinion that such a remote vendee can only recover on a showing that the manufacturer failed to exercise reasonable care. The court there stated:

> "The reasoning of the above cases is based upon fundamental concepts of the law of negligence. The wrong consists in an act creating an unreasonable risk of harm to the person or property of another, where it is foreseeable that the failure to use reasonable care will create such risk. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253. In the case of a manufacturer who, through national advertising media such as magazines, newspapers, radio and television, creates a demand for his product and does the affirmative act of putting such product in the channels of trade, it is foreseeable that if reasonable care is not used in manufacturing a risk of injury to the person or property *of the ultimate consumer* is apt or likely to result. Actually, in the final analysis, no other person in the distributive chain needs protection. The whole discussion of contract law in this tort area is misleading, since the duty of care on the part of the manufacturer does not arise out of contract, but *out of the fact of offering goods on the market to remote users, as to whom there is a foreseeable risk of harm, if due care is not used.*
>
> "Of course, for the risk to be foreseeable, the use

> to which the goods are put must be the intended one. However, in the case at bar, all of the elements of a tort are present, and, if appellant can prove a 'failure to use reasonable care on the part of the respondent manufacturer, he should be entitled to recover.'"

The case of *Esborg v. Bailey Drug Company,* 61 Wn.2d 347, 378 P.2d 298 (1963) in no manner altered existing Washington law on the subject of a manufacturer's liability in implied warranty in the absence of privity. The decision, which is expressly predicated on the case of *Mazetti v. Armour,* 75 Wash. 622, 135 Pac. 633 (1913), merely affirms that in the case of defective *consumable* products a remote vendee may recover against the manufacturer on the basis of breach of implied warranty despite lack of privity.

The same is true of the case of *Brewer v. Oriard Powder Company,* 66 Wn.2d 187, 401 P.2d 844 (1965). While the author of the opinion gratuitously observed that "it seems that a searching judicial review of the privity rule is in order," the holding of the case—that "a manufacturer of dynamite is liable to the ultimate user for breach of implied warranty of fitness without regard to privity—does not constitute a departure from earlier decisions of the court. The case is nothing more than a logical extension of the decision in *Marsh v. Usk Hardware Company,* 73 Wash. 543, 132 Pac. 241 (1913); and the Washington Supreme Court early recognized that cases involving sales of explosives were to be resolved on the same basis as sales of foodstuffs. *Foster v. Ford Motor Company,* 139 Wash. 341, 350, 351, 246 Pac. 945.

It should be further noted that the case of *Ringstad v. I. Magnin & Co.,* 39 Wn.2d 923, 239 P.2d 848, does not deal with the issue here at hand. In that case there was contractual privity between the plaintiff and defendant and the court's decision is accordingly based on the implied warranty imposed upon the defendant by the Uniform Sales Act.

It is clear from a review of pertinent Washington decisions that the issue presented by the case at bar is one which has been considered by the Washington court on numerous occasions and the Washington court has uniformly held that in the absence of contractual privity no action may be maintained against a manufacturer on the basis of breach of implied warranty, except in cases involving consumable items and inherently dangerous articles, such as dynamite.

Appellants have extended an invitation to this court to enter a decision which would drastically alter the rule of law as announced by numerous decisions of the Washington State Supreme Court. As has been seen, the effect of such a decision by this court would be to overrule a series of Washington Supreme Court decisions extending from the year 1913 until the present. It is respectfully submitted that this court's true role in a diversity case is to determine and apply existing state law, not to reshape such law. *Polk County, Georgia v. Lincoln National Life Insurance Company,* 262 F.2d 486 (C.C.A. Ga. 1959); *Yoder v. Nu-Enamel Corporation,* 117 F.2d 488 (C.C.A. Neb. 1941).

CONCLUSION

The law is settled in the State of Washington that there is no right of action against a manufacturer on the basis of breach of implied warranty in the absence of privity, excepting only situations dealing with the sale of consumable items and inherently dangerous products, such as explosives.

Additionally, appellants failed to submit legally sufficient evidence establishing that the defect which caused the bottle to fracture existed before the bottle left appellee's control. Even assuming that appellants had a cause of action on the basis of a claimed breach of implied warranty, they failed to produce sufficient evidence to carry the issue to the jury.

Further, the instructions requested by appellants on the issue of appellee's alleged liability in implied warranty did not accurately state the law with respect thereto and were confusing and misleading.

For all the reasons herein assigned the trial court did not err in refusing to instruct the jury as proposed by appellants and the judgment should be affirmed.

Respectfully submitted,

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FRANK W. DRAPER
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank W. Draper
of Attorneys for Appellee

No. 22120

IN THE

United States Court of Appeals For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT, wife and husband,
Appellants,
v.
ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Appellants respectfully submit that

(1) The sole substantial issue before this Court is whether, under the facts of the instant case, privity between appellants and appellee is a requisite to maintenance of an action based on the breach of an implied warranty;

(2) The Washington State Supreme Court, as manifested by its consistent expansion of warranty-based liability and its explicit recognition of the significant judicial trend toward abolition of the privity requirement, would compel submission of the warranty issue to the jury;

(3) Credible evidence was before the jury substantiating each of the essential facts upon which the expert witness presented by appellants predicated his opinions;

(4) The instructions requested by appellants properly stated the law applicable to an action based on a breach of warranty; and

(5) A trial court has an affirmative duty to instruct the jury on the law applicable to each material issue presented by the pleadings and the evidence.

I. The Sole Issue

For clarity, it must be emphasized that the trial court's refusal to instruct the jury, as to the alleged breach of implied warranty, was based solely upon the lack of privity between appellants and appellee.

The specific form of appellants' requested instructions as to the warranty and its alleged breach was never discussed with counsel, nor otherwise alluded to by the Court.

Similarly, the trial court, in announcing its decision to refuse to submit the warranty issue to the jury, pointed to no alleged deficiency in appellants' proof, but rather predicated said refusal expressly upon the assumed legal principle that privity was required.

As will be hereinafter analyzed, the jury had before it credible evidence to substantiate a determination that appellee had breached a warranty of fitness and suitability.

Thus, the sole issue squarely presented to this Court is whether, under the circumstances of the instant case, the

Washington State Supreme Court would require privity as a condition precedent to maintenance of an action based upon breach of warranty.

II. The Washington State Supreme Court Would Compel Submission of the Warranty Issue to the Jury

It is manifest that the past 10 to 15 years has witnessed a broad-scale judicial abolition of the privity requirement and a concomitant extension of warranty-based liability. Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L.Review 791 (1966); *Putnam v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964) (defective wheel chair); *Chapman v. Brown*, 198 F.Supp. 78, affirmed sub nom., *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962) (inflammable hula skirt); *Greeno v. Clark Equipment Co.*, 237 F.Supp. 817 (N.D. Ind. 1963) (automobile tire); *Spada v. Stauffer Chemical Co.*, 195 F. Supp. 819 (D.Ore. 1961) (weed killer); *Chairaluce v. Stanley Parner Management Corp.*, 236 F.Supp. 385 (D. Conn. 1964) (defective shoes); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966) (recovery by bystander against producer for injuries resulting from exploding beer keg); *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966) (recovery based upon commercial loss caused by defects in tractor); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1966) (defective battery).

Moreover, warranty-based liability has been specifically imposed upon manufacturers, or other processors, for injuries caused consumers by defective containers. Such liability has proceeded from a judicial recognition of (1) the general trend toward abrogation of the privity requirement as to all manufactured articles, and (2) the lack of any valid distinction between a defective foodstuff, to which a common law warranty of fitness has historically applied, and a defective container in which the foodstuff is sold.

Cases so holding include

(1) *Kroger Company v. Bowman*, 411 S.W.2d 339 (Ky. 1967), adjudging a soft drink manufacturer liable to a remote consumer for injuries caused when a bottle fell from a defective carton in which the bottled drinks were sold;

(2) *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317, 323, 38 A.L.R.2d 887 (1958), wherein the court, in approving warranty-based recovery against the manufacturer and distributor for injuries sustained by a purchaser's child when a soft drink bottle exploded, stated: ". . . neither are we greatly concerned about the privity of contract;" and

(3) Cases previously cited in Appellants' opening brief (pages 11-14).

Contrary to appellee's assertions, warranty-based liability was imposed in the following cases despite the absence of privity:

(1) *Mahoney v. Shaker Square Beverages*, 102 N.E.2d 281, 288 (Ohio 1951), wherein the court, despite affirmatively recognizing the lack of privity between the plaintiff-employee and the defendant, affirmed recovery;

(2) *Jones v. Burgermeister Brewing Corporation*, 18 Cal.Reptr. 311, 313, 316, 198 Cal.App.2d 198 (Cal.-App. 1962), wherein the court, in reversing a judgment for the defendant bottler and the defendant distributor, stated:

"They (the defendants) denied the existence of a warranty as alleged by plaintiff.

"The jury not having been instructed on the issue of implied warranty, an essential issue in this case, the cause is remanded to the trial court."

(3) *Vallis v. Canada Dry Ginger Ale, Inc.*, 11 Cal. Reptr. 823, 826-827, 828-830, 190 Cal.App.2d 35 (Cal.App. 1961), an affirmative holding that the lack of privity is no defense to a warranty action based upon the bursting of a soft drink bottle, which states:

> "Whatever the arguments for limiting the manufacturer's strict liability to foodstuffs, *there is no rational basis for differentiating between foodstuffs and their containers.* Nichols v. Nold, 174 Kan. 613, 258 P.2d 317, 323, 38 A.L.R.2d 887; Cooper v. Newman, City Ct., 11 N.Y.S.2d 319, 320; Haller v. Rudman, 249 App.Div. 831, 292 N.Y.S. 586, 587; McIntyre v. Kansas City Coca Cola Bottling Co., D.C., 85 F.Supp. 708, 711; Mahoney v. Shaker Square Beverages, Ohio Com. Pl., 102 N.E.2d 281, 289; Geddling v. Marsh, (1920) 1 K.B. 668, 672-673; Morelli v. Fitch and Gibbons ((1928) 2 K.B. 636, 642-644; See Prosser, Torts, (2nd ed.) 84, p. 509." (Emphasis supplied)
>
> " 'This metaphysical distinction between the container and the contents can only be regarded as amazing.' " (Citing Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099, 1138).

The Washington State Supreme Court has expressly recognized and approved the trend toward complete abrogation of privity requirements in its extension of warranty-based liability to cases involving cosmetics, *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 354-355, 378 P.2d 298 (1963), and glass doors, *Dipangrazio v. Salamonsen*, 64 Wn.2d 720, 722-723, 393 P.2d 936 (1964) (relying upon *Greeman v. Yuba Power Products, Inc.*, 27 Cal.Rptr. 697, 377 P.2d 897 (1962), which case applies strict liability in tort without privity and without proof of negligence).

Similarly, the Washington State Supreme Court has repeatedly stated that a "realistic, judicial analysis and reappraisal of the privity rule" is merited, *Freeman v.*

Navarre, 47 Wn.2d 760, 289 P.2d 1015 (1955); *Brewer v. Oriard Powder Co.,* 66 Wn.2d 187, 401 P.2d 844 (1965); *Kadiak Fisheries Co. v. Murphy Diesel Co., Inc., et al,* 70 W.D.2d 148, 158, 422 P.2d 496 (1967).

Thus the *Brewer* case, 66 Wn.2d 187, *supra,* at 190-193, states:

> "Since 1842, when the Court of Exchequer decided the case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402, the law has been constantly developing and growing as it keeps pace with changing social philosophy and expanding methods of manufacturing and distribution. *There is a certain and steady trend in the direction of fixing greater responsibility in manufacturers and sellers.*
>
> ". . . *It must be recognized that we are now dealing with new vistas in the field of implied warranty.*" (Emphasis supplied)

Significantly, Dean Prosser lists Washington among those states which ". . . accept the strict liability, without negligence and without privity, as to the manufacturers of all types of products." Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn.L.Rev. 791, 794-795 (1966).

The expansion of the scope of warranty-based liability has been bottomed upon the recognition that the restrictive privity rule, being a judicial creation, could be abrogated judicially. Thus, the Pennsylvania Supreme Court has stated:

> "Furthermore, we recognize the social policy considerations behind imposing strict liability in tort upon all those who make or market any kind of defective product, *notwithstanding an absence of negligence on their part.*" *Miller v. Preitz,* 422 Pa. 383, 221 A.2d 320 (1966) (Emphasis Supplied).

> "We are today adopting a new basis of liability (Section 402A, Restatement of Torts)." *Webb v. Zern*, 220 A.2d 853, *supra*, at 854.

Significantly, in analogous situations, the Washington State Supreme Court has unhesitatingly amended and overruled its prior decisions because of changing social conditions. Thus, in *Friend v. Cove Methodist Church, Inc.*, 65 Wn.2d 174, 176, 178, 396 P.2d 546 (1964), the court, sitting *en banc*, in overruling prior cases and in abrogating in its entirety the doctrine of charitable immunity from tort liability, stated:

> "We then determined that, inasmuch as the doctrine was created by the court and not by act of the legislature, the court could properly repudiate it.
>
> " 'The almost unanimous view expressed in the recent decisions of our sister states is that, insofar as the rule of immunity was even justified because of the need of financial encouragement and protection, changed conditions have rendered the rule no longer necessary.' "

Similarly, in *Lockhart v. Besel*, 71 W.D.2d 109, 114, 426 P.2d 605 (1967), the Washington State Supreme Court, again sitting *en banc*, in overruling prior inconsistent cases and extending the measure of damages for the wrongful death of a minor child beyond those damages previously allowed (pecuniary loss only), stated:

> "This rule (the expanded measure of damages) is consistent with the better reasoned cases and the modern trend in other jurisdictions of this country."

Appellants submit that the Washington State Supreme Court would similarly adhere to the overwhelming trend in products liability cases toward complete abrogation of any privity requirements.

III. The Essential Facts are Established

Recognizing at the outset their burden of establishing that the bottle (Ex. A-2) was defective before it left appellee's premises, appellants submit that credible and substantial evidence of that and each other material fact was presented.

Evidence, largely uncontradicted and clearly probative, was presented to establish that

(1) the bottle (Ex. A-2), as originally manufactured, was not defective (Tr. 177, 327-328);

(2) the bottle was subjected to considerable pressure during appellee's capping (crowning) operation (Tr. 267);

(3) the bottle was not inspected for breakage after it was capped (Tr. 274-275, 276-277, 333);

(4) appellant Margie Elliott used due care in attempting to open the bottle with a standard bottle opener (Ex. A-1) and with a normal opening method (Tr. 28-30);

(5) Mrs. Elliott had personally purchased the 6-bottle carton, carried it home, and placed it in her refrigerator all without untoward incident (Tr. 25-26);

(6) she had previously opened 2 other bottles from the same carton, using the same opener and the same opening method, without mishap (Tr. 26, 28-29);

(7) the breakage of the bottle emanated from 2 crack lines (fractures) beginning beneath the cap and progressing downward (Ex. A-2; Tr. 144, 286, 326);

(8) there was extensive cracking underneath the cap of the bottle (Tr. 290);

(9) despite the fragmentation of the bottle, its cap remained firmly attached to it (Ex. A-2); Tr. 149, 158-159, 329);

(10) there was no impact damage to the bottle or to the cap (Tr. 149-150, 154, 289, 328); the breakage was not caused by an external blow (Tr. 328);

(11) there were no physical signs indicating that the bottle was in any way damaged after it left appellee's bottling plant (Tr. 162);

Mr. Smith, the expert witness presented by appellants, reasoned that the bottle was cracked and thus weakened by the pressure exerted in appellee's capping operation because

> ". . . opening pressures on a normal bottle, from a little wire tool of this type produced by hand, probably could not be developed under any conditions to produce two cracks simultaneously originating from the cap area of the bottle. There is no damage indicating that the opener is sharp or would have caused trouble, and most certainly the strength of the bottle normally is way beyond anything that an ordinary wire-type cap removing instrument could produce this type of thing normally." (Tr. 148-149)

> "A. The facts are quite evident to me from a technical standpoint that the bottle in normal condition, the cap in normal condition, that its seal could not be broken by mere opening attempts which do not even distort the cap. That is the primary significance. Bottles just don't fall apart. The fact that the cracks emerge and radiate from under the cap at the point of cap crimping, and the fact that both cracks propogate from that position downward, is supporting strength, and considerable supporting strength to the fact that a machine operation produced these cracks, weakened the bottle by actually producing cracks and fractures through the glass to the point where it

now is somewhat like the glazier's glass that has the scratch in it. This to me has had a crack in it from the capping operation, and in the absence of no surface damage that would come from normal handling in the store or the home." (Tr. 159-160)

Contrary to appellee's assertions, the record indicates that the bottle was subjected to considerable pressure (400 to 800 pounds) in appellee's capping operation (Tr. 267). Thus, Mr. Duncan, appellee's production superintendent, stated:

"Q. With respect to placing the cap or crown on the bottle, at one point or another it has to be crimped to get over that ring at the top of the bottle and to seal it so that the air can't get in; is that correct.

"A. Yes, sir." (Tr. 275)

"You see this have a bevel in it, the crimping throat. It is bigger at this end, and as it comes down over the bottle like that, it will tighten the skirt on the bottle like this, *from the pressure* (indicating)." (Tr. 276; Emphasis supplied)

"Q. Then does it squeeze against the skirt in order to crimp it?

"A. Oh, yes." (Tr. 280)

"Similarly, Mr. Kirk, appellee's expert witness, stated that the crimping throat on appellee's capping machine was beveled ". . . *to minimize if we can the amount of pressure* that is necessary to break that crown in its initial impact or the initial start of the crowning operation . . ." (Tr. 341; Emphasis supplied)

Thus, appellants submit that probative evidence was presented substantiating each of the facts essential to the opinions expressed by Mr. Smith. The following cases are apposite:

(1) *Jones v. Burgermeister Brewing Corp.*, 18 Cal. Reptr. 311, *supra*, at 313 which states:

"The evidence given in the instant case by the independent expert of the existence of a 'pronounced abrasion or scuff mark at the lower portion of bottle which was probably caused by grinding some hard object against the bottle **' was sufficient to require the court to properly instruct the jury on both issues of implied warranty and negligence."

(2) *Naumann v. Wehle Brewing Co.*, 15 A.2d 181, 182 (Conn. 1940), wherein the court affirmatively answered the following question:

"There was evidence that a defect in the bottle might cause the explosion and evidence which might be taken as eliminating all the other suggested possibilities above mentioned. There was nothing after delivery of the bottles to the plaintiff to account for the explosion from any other cause. The question is, therefore, was this a permissible inference?"

(3) *Kroger Company v. Bowman,* 411 S.W.2d 339 (Ky. 1967), *supra,* at 342, wherein the court stated:

"The facts under consideration need only warrant the inference, not compel it."

(4) *Helland v. Bridenstine*, 55 Wash. 470, 475, 104 Pac. 626 (1909), affirming a damages award (venereal disease allegedly caused by improper medical attention) despite expert medical testimony to the contrary, the court stating:

"The respondent was not required to prove her case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that she show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable."

(5) *Helman v. Sacred Heart Hospital,* 62 Wn.2d 136, 147, 148, 381 P.2d 605 (1963), affirming an award for damages caused by a staphylococcus infection despite contradictory opinion testimony of medical experts, the court stating:

> "We do not have an inference founded upon another inference or conjecture, but rather strong circumstances pointing one way or the other from which the jury could and did find the ultimate facts.
>
> "If, as we have shown, there was sufficient evidence of believable qualities arising from the direct and cross-examination of all witnesses, the courts ought not to weigh the quantum of evidence to determine if it balances on one side or the other. Weighing the evidence lies exclusively within the province of the jury."

(6) *Kuster v. Gould National Batteries,* 71 W.D.2d 463, 475, 429 P.2d 220 (1967), approving a warranty-based recovery for injuries caused by an exploding battery, wherein the court stated:

> "Upon the physical facts presented by the evidence, the question of producing cause resolved itself into a conflict between expert opinions. We are satisfied that there was substantial evidence to sustain the findings of the trial court."

Significantly, the last two cases cited distinguish *Prentice v. United Pacific Insurance Company,* 5 Wn.2d 144, 106 P.2d 314, on which appellee relies.

Appellants submit that the instant case similarly resolved into a conflict of expert opinions. Appellants believe that Mr. Smith's opinions are far more plausible than Mr. Kirk's conjecture that the bottle fractured because an improper opening tool was abnormally used (Tr. 317).

However, appellants, recognizing that it is the jury's province to decide which opinions are more solidly based, simply request that the case be submitted to the jury under proper instructions as to the law.

IV. The Instructions Requested by Appellants Properly Stated the Law

Appellants submit that their proposed instructions numbered 3 and 12 properly state the basic guidelines to be followed by the jury in its determination of the instant case.

Proposed Instruction No. 3 states plainly that the jury, in order to find for appellants, must conclude that the bottle was defective and thus not reasonably fit for use, that the defect was present before the bottle left appellee's control, and that the defect caused appellant's injuries. Thus, the jury was informed as to all the prerequisites to a finding that an implied warranty had been breached.

Proposed Instruction No. 12 states plainly that a breach of warranty is separable from negligence, and that negligence need not be proven to establish a breach of warranty. Appellants submit that said instruction accurately states the law, *Lundquist v. Coca-Cola Bottling, Inc.*, 42 Wn.2d 170, 254 P.2d 488 (1953); *Frisken v. Art Strand Floor Covering, Inc.*, 47 Wn.2d 587, 592, 288 P.2d 1087 (1955), and that the failure to submit it to the jury prejudicially cast upon the appellants the burden of establishing appellee's negligence.

Appellee's argument (brief of appellee, pages 13-15) appears to concede the validity of the legal principles set forth in appellants' proposed instructions, but questions the affirmative manner in which said principles are stated. Apparently, appellee would prefer that any instruction with respect to the warranty and its breach be set forth negatively instructing the jury that no recovery could be had "unless" certain facts were established.

In this context, it is noted that none of the 20 instructions proposed by appellee touch even tangentially upon the issue of implied warranty. Moreover, as previously indicated, the trial court did not concern itself with the form of the instructions proposed by appellants relating to the warranty, and its alleged breach, but rather ruled categorically that the warranty issue was not before the court because privity was absent.

Appellants' concern is not the manner in which the legal principles relevant to a breach of warranty action are presented to the jury. Appellants' concern is that its theory of the case was in no manner presented to the jury.

V. The Trial Court Had an Affirmative Duty to Instruct the Jury With Respect to the Alleged Warranty and Its Breach.

Appellants, recognizing that they have the prime duty to submit to the court proposed instructions correctly embodying the legal principles applicable to their theories of the case, submit that they have done so.

However, it is additionally submitted that a trial court has an affirmative duty to instruct the jury on the law applicable to each material issue presented by the pleadings and the evidence. *Hall v. Blackham*, 417 P.2d 664, 666 (Utah 1966); *Nichols v. Sonneman*, 418 P.2d 563, 568 (Idaho 1966).

Each party to a lawsuit is entitled to have his theory of the case presented to the jury. *Heinz v. Blagen Timber*

Company, et al, 71 W.D.2d 715, 431 P.2d 173 (Wn. 1967). The trial court, on its own motion, must properly charge the jury on the issues raised by the pleadings and the evidence in the case. *Marathon Battery Co. v. Kilpatrick,* 418 P.2d 900 (Okla. 1966).

If a requested instruction is not entirely proper, it is the duty of the trial court to correct it. *State ex rel. Mondale v. Gannons, Inc.,* 145 N.W.2d 321, 330 (Min. 1966). Thus, in *Jones v. Burgermeister Brewing Corporation,* 18 Cal.Reptr. 311, *supra,* at 315, the court, in response to respondent's assertion that the instructions proposed were faulty and that the court accordingly was not required to give them, stated:

> "This did not relieve the court of the responsibility to properly instruct the jury on the controlling legal principles applicable to the case."

CONCLUSION

Appellants again respectfully submit that the sole issue before this court is whether the breach of warranty issue should have been submitted to the jury. Appellants further assert that the form employed to instruct the jury as to a breach of warranty action is relatively inconsequential, but that they were prejudiced by the total failure of the trial court to submit the breach of warranty theory to the jury in any form.

Respectfully submitted,

Broz, Long, Mikkelborg,
Wells & Fryer
Robert O. Wells, Jr.
Jacob A. Mikkelborg
Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert O. Wells, Jr.
of Attorneys for Appellant

No. 22120

IN THE

United States Court of Appeals For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT,
wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING

LONG, MIKKELBORG, WELLS & FRYER
By ROBERT O. WELLS, JR.
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IN THE

United States Court of Appeals
For the Ninth Circuit

Margie J. Elliott and Lon Elliott,
wife and husband,
Appellants,

v.

Alpac Corporation, a Nevada Corporation,
d/b/a Glaser Beverages,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING

The court's opinion dated May 30, 1968, is bottomed upon two associated findings:

(1) That, as Mr. Smith was not aware whether appellee used a claw-like mechanism to secure the cap on the bottle, the predicate for his opinion was conjectural; and

(2) That, "it was clearly established that, in fact, there is no claw-like *or crimping mechanism* in its bottling process and that the 'crimps' in the cap are a part of the cap manufacturing process" (emphasis supplied).

In response to the first finding, appellants respectfully submit that the predicate for Mr. Smith's opinion is that pressure exerted in the capping process produced the defects in the bottle. The crucial physical fact to Mr. Smith was not the precise nature of the mechanism used to cap the bottle, but the fact that pressure was required for the capping.

Thus, Mr. Smith stated:

> "*The clamping pressures of the capping machine exert certain forces. The bottle is designed to withstand those forces normally.* The capper goes down, seats the cap, and it has some claws that crimp the cap under the seal ring which is under the cap making it necessary to expand the cap to take it off. *Those forces are of a certain range, and the bottle is normally designed to take those forces if the capping machine is working.* Now, when one introduces and finds on the bottle scratches in the surface, it goes without question that in an annealed piece of glassware, that the surface, that the strength is weakened by the same analogy that the glazier weakens this piece of glass with a diamond tool or a hardened steel point, puts in scratch, and weakens it so that it can be broken, and that crack will follow, hopefully at least, along the scratch that he has put in, and this weakness is material depending upon where the pressure point comes with respect to the scratch. *Here we have a pressure point due to the pressure of the capper, the crimping of the cap, the scratches that are adjacent, and stresses are set up here in a weakened condition also*" (Tr. 145-146; emphasis supplied).
>
> "The significance is that measures of abnormally high conditions in the capping machine could have produced it, if the bottle were weak, and it is in the case here, with scratches, *that normal crimping pressures would tend to produce, greatly more tend to produce splitting of the bottle, opening up of the bottle along the scratch line because of the weakness*" (Tr. 147; emphasis supplied).

In response to this court's second finding, appellants respectfully submit:

(1) That the finding is factually erroneous because a crimping mechanism was indisputably used in the capping operation; and

(2) That the evidence relating to crimping and capping abundantly establishes the predicate for Mr. Smith's opinion, i.e., that pressure was exerted in capping the bottle.

Thus, Mr. Duncan, appellee's production superintendent, testified:

"Q. With respect to placing the cap or crown on the bottle, at one point or another *it has to be crimped* to get over that ring at the top of the bottle and to seal it so that air can't get in; is that correct?

"A. *Yes, sir.*

"Q. Could you explain to the jury how that is accomplished?

"A. That is done by that flexible throat as we call it that comes down over the bottle, and as it comes down it gives a little, away from the bottle, it will tighten the crown on to the bottle.

"Q. It tightens the crown?

"A. *It crimps the skirt* as we call it, the flareout skirt" (Tr. 275; emphasis supplied).

"Q. Excuse me. If it is flexible, it does mean that there is pressure applied?

"A. Yes, *there is pressure to the skirt applied to the skirt of the crown,* to fold it down around the crowning ring as we call this" (Tr. 279; emphasis supplied).

"Q. What did you mean when you said that it squeezed the skirt of the cap or something? Explain to the jury what you mean by that.

"A. That is to form this flare around this crowning ring, and as this passes down, like that (indicating), *it will come down under pressure on to the cap.*

"The Court: *How many pounds of pressure,* if you know?

"The Witness: Well, on the first operation there is a foot that goes through here that holds this crown on which is around 400 pounds, and as this crowning head comes on, *there is exerted between 700 and 800 pounds* from a spring up in the crowning that is pushing this down" (Tr. 280; emphasis supplied).

CONCLUSIONS

As evidence of substantial probative value was presented to establish all physical facts essential to Mr. Smith's opinion, it is submitted that it is the function of the jury to determine the value to be placed upon that opinion.

The expert witnesses agreed that there was extensive cracking underneath the cap of the bottle (Tr. 290); that the breakage of the bottle emanated from two crack lines (fractures) beginning beneath the cap and progressing downward (Ex. A-2; Tr. 144, 286, 326); and that the breakage of the bottle was not caused by a blow (Tr. 328), or any other type of impact (Tr. 149-150, 154, 289, 328).

Under these circumstances, appellants submit it is manifest that it is a jury's province to determine factually whether or not pressure exerted in the capping operation produced the cracking, fracturing and breakage.

Accordingly, it is further respectfully submitted that appellant, Margie J. Elliott, a seriously and permanently disabled woman, is entitled to a reconsideration by this court of its decision, and to an order by this court remanding the case to the trial court for submission to a jury on the warranty issue.

Respectfully submitted,

LONG, MIKKELBORG, WELLS & FRYER
By ROBERT O. WELLS, JR.
Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rule 23 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing petition is well founded and that it is not interposed for delay.

I also certify that this petition has been served on all adverse parties herein.

ROBERT O. WELLS, JR.
of Attorneys for Appellants

No. 22121

IN THE

United States Court of Appeals For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
Appellant,

v.

H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTS SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
Appellees and Cross-Appellants,

v.

HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

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IN THE

United States Court of Appeals
For the Ninth Circuit

Fowler Manufacturing Company, a corporation,
Appellant,

v.

H. H. Gorlick and Morris Gorelick, co-partners, d/b/a Thrifty Supply Company; Thrifts Supply Co. of Everett, Inc.; Thrifty Supply Co. of Spokane, Inc.; Thrifty Supply Co. of Tacoma, Inc.; and Thrifty Supply Co. of Yakima, Inc.,
Appellees and Cross-Appellants,

v.

Howard Keller, Keller Supply Company, Inc., a corporation; Max Rosen; and Norman Mesher,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The complaint was filed and proceedings instituted in the United States District Court for the Western District of Washington, Northern Division, against the appellant, Fowler Manufacturing Company, a corporation; cross-appellees, Howard Keller, Keller Supply Company, Inc., a corporation, Max Rosen and Norman Mesher (R. 1), under the Federal Anti-trust laws, specifically: the Sherman Anti-trust Act, Sections 1, 2, 4 (15 U.S.C.A., Sections 1, 2, 4) and the Clayton Act, Sections 4, 15 and 16 (15 U.S.C.A., Sections 15, 25 and 26), and the Clayton Act, as amended, Sections 2 and 2(a), (15 U.S.C.A., 13 and 13(a)), which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws (R. 1).

A motion by the appellant and cross-appellees for summary judgment (R. 72) as to all of the claims of the appellees, was granted except on claims of alleged violations as to 15 U.S.C.A., Sections 13 and 13(a) (R. 74, 336, Finding I).

Judgment was entered against the appellant, Fowler Manufacturing Company, in the amount of $25,621.80 plus $9,000 attorney fees and costs, or a total of $34,621.80 (R. 362). The cross-appellees, Howard Keller, Keller Supply Company, Inc., a corporation, Max Rosen and Norman Mesher, in said judgment were dismissed, with prejudice (R. 362).

On July 27, 1967 appellant filed Notice of Appeal in the District Court (R. 364). The appellees, on August 8, 1967, filed notice of cross-appeal (R. 375).

The appeal to the United States Circuit Court of Appeals for the Ninth Circuit is from a final decision of the United States District Court, for the Western District of Washington, Northern Division, which district court is in the Ninth Circuit.

The United States Circuit Court of Appeals for the

Ninth Circuit has jurisdiction by virtue of Section 1291 of the Judicial Code, Title 28, U.S.C.A., Section 1291.

STATEMENT OF THE CASE

The appellant, Fowler Manufacturing Company, has its principal place of business in Portland, Oregon (R. 339). During the period involved in this case; that is, October 28, 1960 through October 31, 1962, the Fowler Manufacturing Company manufactured and distributed electric water heaters and also distributed, but did not manufacture, gas water heaters (R. 339). The general labels were "Fowler" and "Republic" (Tr. 217). It also accommodated its customers by manufacturing under private labels (Tr. 1083). All the water heaters of any particular size manufactured by the appellant were precisely the same, irrespective of label, excepting for color trim (Tr. 1313). The cost of manufacture, as the Court found, was the same (R. 340, Finding VII).

Fowler Manufacturing Company manufactured a number of different sizes and models (Tr. 1329, 1330). The electric water heater far outsold the gas water heater; the ratio being about ninety percent electric and ten percent gas water heaters in the State of Washington (Tr. 1329), wherein the appellees and cross-appellees conducted their respective businesses.

The popular size in water heaters is fifty-two gallons, which takes in about fifty percent of the market (Tr. 1329). The next in popularity is the sixty-six gallon size, which accounts for approximately seventeen percent of the market (Tr. 1329), and the balance of the consumption of water heaters is covered by the other miscellaneous sizes and models (Tr. 1329, 1330). It was customary for water heaters to carry warranties, and the prices of the water heaters varied according to the length and type of warranty, i.e., full or proportional (R. 340).

H. H. Gorlick and Morris Gorelick are brothers, although they spell their surnames differently (Tr. 2). During the period involved, they did business in Seattle as a co-partnership, under the firm name and style of Thrifty Supply Company (R. 262). They also owned substantially all the stock, in equal shares, in Thrifty Supply Co. of Everett, Inc., Thrifty Supply Company of Spokane, Inc., Thrifty Supply Company of Tacoma, Inc., and Thrifty Supply Company of Yakima, Inc. (R. 337, 338). The principal place of business of the co-partnership was and is in Seattle, with its distribution in Western Washington, primarily in the Puget Sound area (R. 337). Distribution of Thrifty Supply Company of Everett and Thrifty Supply Company of Tacoma, is in Western Washington primarily in the Puget Sound area (R. 337, 338).

The Thrifty Supply Company of Yakima, Inc. and Thrifty Supply Company of Spokane, Inc. have their respective sales areas in Eastern Washington (R. 338). All of the appellee corporations are Washington corporations (R. 337, 338).

For the purposes of this lawsuit, all of the appellee corporations were to be considered as one organization (R. 338).

The books and records of all the appellee corporations were kept at the Seattle office, where the accounting was done (R. 338). The purchases were all made from the Seattle office, but each corporation was invoiced separately (R. 338). Each corporation had its own bank account (R.

338). All bank accounts of the partnership and the four corporations were in the same bank, Peoples National Bank, First Avenue Branch, on December 4, 1962 (Ex. A-8).

The appellees were engaged as wholesalers in the distribution and sale of plumbing supplies (Tr. 2, 4), generally to plumbers working on new residential and apartment construction and to retail outlets (Tr. 3). One of the major items sold by appellees was hot water heaters, both gas and electric (R. 337).

All of the cross-appellees are engaged in the same type of business as the appellees (R. 338, 339). The cross-appellees are in direct competition with each other, and with appellees (R. 259, 339, Finding V).

Keller Supply Company, Inc. is a Washington corporation, with its principal place of business in Seattle, Washington (R. 338). Its sales area is mainly in Western Washington, in the Puget Sound area (R. 338).

Norman Mesher, doing business as Mesher Supply Company, has his principal place of business in Seattle, with his sales area mainly in Western Washington in the Puget Sound area (R. 338).

Max Rosen, doing business as Rosen Supply Company, has his principal place of business in Tacoma, Washington. His sales area is primarily in Western Washington, in the Puget Sound area (R. 339).

Howard Keller, Norman Mesher and Max Rosen are brothers-in-law (R. 263).

Norman Mesher has been in this business in Seattle since 1925 (Tr. 730); Howard Keller has been in the same business since 1945 (Tr. 448). Appellees started in 1951 (Tr. 4).

The electric water heater is simple of design and quite uniform in manufacture (R. 340, Finding VII). There was very little to choose from among the water heaters manufactured by the various manufacturers servicing the territory wherein the appellees and cross-appellees were seeking business (R. 340, Finding VII). Competition for the sale of water heaters was very aggressive (R. 339).

During the period involved herein the main competition for the business of the wholesalers was from the following labels, each manufactured by a different manufacturer: Mission, Abco, White, General, National, Northern, Rheem, General Electric, Hotpoint, Westinghouse (R. 341, Finding VIII).

Wholesalers who competed on the same level with the appellees and cross-appellees were: Bowles Northwest, Doyle Supply, Palmer Supply, Far West Supply, Grinnel Company, Colombo Supply, Seattle Plumbing Supply, Pacific Plumbing Supply, Crane Company, Seattle Hardware, Pioneer Supply (R. 341, Finding IX).

Of the foregoing, Bowles Northwest, Palmer Supply, Grinnel Company, Seattle Plumbing Supply, and Crane Company were termed the "Big Five" in the industry (R. 341, Finding IX).

On or about October, 1958 Republic Transcon Industries took over the Fowler Manufacturing Company (Tr. 907, 908). The former had granted an exclusive on its Republic brand to the appellees (Ex. 26). Fowler Manufacturing Company, for all practical purposes, was selling only to Schwabacher Hardware, in addition to the appellees, in the Puget Sound area in 1959 (Tr. 19). In the spring of 1960 the appellant desired more distribution in the State of Washington, and particularly in the Puget Sound area (Tr. 218, 219). Elmer Otis (Al) Wilson, sales representative of the appellant corporation, contacted H. H. Gorlick in the early summer of 1960 and informed him of this plan (Tr. 912, 913). H. H. Gorlick objected (Tr. 913) but the objection was not heeded as appellant felt current distribution and volume were not sufficient in view of the total market (Tr. 914).

Mr. Wilson contacted the cross-appellees, and arranged a meeting at the appellant's factory (Tr. 219, 910). Mr. Wilson thought all three of these established firms were good prospects for distribution of the appellant's water heaters in the thickly populated Puget Sound area (Tr. 219). The prospects met Fred Fowler, the President, at appellant's plant in Portland, and were shown through the factory (Tr. 910, 911). None of them committed themselves, nor did the appellant at that time (Tr. 911). Subsequently, each did separately make an initial purchase and continued to make additional purchases during the period involved (Tr. 914, Ex. A-42A-X). The appellees and the cross-appellees, during said period, purchased water heaters from others, as well as the appellant (Tr. 707, 713, Ex. A-4). The evidence established that appellees purchased at times from other manufacturers at prices cheaper than offered by appellant (Tr. 707, 712, 713).

The appellees, feeling themselves aggrieved for breach of the exclusive, sought redress from the Fowler Manufacturing Company, and pursuant thereto two documents were executed, dated September 9, 1960 (Ex. 1; A-32).

One granted to appellees the co-exclusive use with Schwabacher Hardware Company of the Fowler label, provided appellees purchased 10,000 electric water heaters (Ex. A-32). The other document is set forth verbatim in footnote 1 (Ex. 1).[1] Fowler Manufacturing Company was the main source of supply for appellees until August 21, 1962, when exhibit 1, by its terms, expired (R. 345; Finding XIII). Appellees, through counsel, admitted in open Court there was no alleged discrimination after August 21, 1962, and the Court found such to be the fact (R. 347, 348; Findings XVI, XVII).

The Fowler Manufacturing Company, from time to time, issued price lists (R. 344; Finding XII). The appellees, as well as the cross-appellees, frequently requested Fowler Manufacturing Company to deviate from the published price lists, allegedly to meet competition, and these requests were often granted (R. 344; Finding XII). There were various forms of deviations. Inventory clearances (R. 344), promotional allowances (R. 344), advertising allow-

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1. "September 9, 1960

Thrifty Supply Company
1 West Lander Street
Seattle, Washington
Attention—*Mr. Harold Gorlick*

Dear Mr. Gorlick:

We agree that Thrifty Supply Company of Seattle, Washington, has been damaged by a breach and cancellation of a distributorship contract on the part of Fowler Manufacturing Company and the Republic Appliance Division of Republic Transcon Industries, Inc.

We agree that the damages to which you are entitled total $37,500.00 which sum will be paid as follows:

We shall pay to you a sum equal to seven and one-half per cent (7½%) of the purchase price paid by you for electric water heaters purchased from Fowler Manufacturing Company or Republic Appliance Division during each month until the sum paid by us shall total $37,500.00. Said payments shall be made to you on or before the 15th day of each month and shall cover all purchases during the preceding month. We shall have no obligation whatsoever to pay said damages in any other manner or form and should you discontinue the purchase of electric water heatances (R. 344), freight allowances (R. 344), and allowances to meet free delivery by competitors (Tr. 929, 930). On occasions, Fowler Manufacturing Company accepted back orders and protective orders to protect the customer against future change in published price list (R. 344). The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market (R. 344). Appellees often complained about distributors of water heaters manufactured by competitors of the Fowler Manufacturing Company (Tr. 1045; Exs. A-3, A-4, A-5, A-6).

Invoice payment to the Fowler Manufacturing Company was due on the tenth of the following month when, prior to December, 1960 a two percent cash discount was allowed (Tr. 235). In December, 1960 the cash discount was changed to one percent (Ex. 16). The appellees and the cross-appellees, nevertheless, continued to take two percent cash discount, and the Fowler Manufacturing

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ers from the above named sources prior to payment in full of said sum of $37,500.00, we shall be relieved of any further obligation or liability to pay the balance of said damages.

It is understood and agreed that no deductions shall be made from invoices by you and that the full amount of said invoices will be paid by you when due. The 7½% hereinabove referred to shall be based upon the prices of heaters in effect at the time of each purchase by you, as set forth in our established price lists.

We reserve the right to change our established price lists at any time we see fit and the sum due to you by the terms of this agreement shall be based on the price lists in effect at the time of each purchase.

You will pay to Fowler Manufacturing Company all monies due to it at this date at once and will hereafter pay all accounts in full when due. You shall have no right of off-set as to the monies which we have agreed to pay you by the terms of this agreement.

Very truly yours,
FOWLER MANUFACTURING COMPANY
By Fred A. Fowler, President

Agreed to and accepted:
Thrifty Supply Company
By (Sgd.) Harold Gorlick"

Company accepted the same, until May 19, 1961 (R. 345; Finding XIII).

The March, 1961 payment due from the appellees was not paid (Tr. 1377-1381). The appellees were delinquent in the sum of approximately $35,000 (Tr. 1377-1381; R. 346; Finding XV). Gordon Copeland, an executive of the Fowler Manufacturing Company, called upon H. H. Gorlick on May 8, 1961 and obtained the payment for all of March and April invoices (Tr. 944, 945). H. H. Gorlick drew up a debit memo (Ex. 39), which was signed by Mr. Copeland. The next day, May 9, 1961, the Fowler Manufacturing Company issued its credit memo 321 (Ex. A-1), which is as follows:

> "Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.
>
> "The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims. $4,639.68"

There is no itemization in the credit memo.

There is considerable evidence in the case which establishes rather conclusively there could not be much of this sum attributable to defective merchandise, or mathematical errors (Tr. 945, 946, 1327-1329).

Shortly after the issuance of said credit memo 321, H. H. Gorlick met with Milton Stevens, Mr. Copeland's superior (Tr. 576), and pursuant thereto wrote a letter to Fowler Manufacturing Company, dated May 19, 1961, in which he agreed he would pay on time and that he would only take one percent discount, instead of two percent (Ex. A-24). The appellees then only deducted one percent for cash from their invoices, until the credits under the agreement of September 9, 1960 were fulfilled, on or about August 21, 1962, when the appellees were again allowed two percent discount for prompt payment (R. 347, 348, Finding XVII).

The Fowler Manufacturing Company gave to Keller Supply Company a two percent discount, other than discount for prompt payment, on all merchandise purchased from it from on or about December 1961 excepting "Zenith" private label heaters (R. 347; Finding XVII). The total amount of purchases made by appellees, from on or about December 1961 to August 21, 1962 was the sum of $251,307.83. This discount was first granted in June, 1962, retroactive to December 25, 1961 (Ex. A-42-A-X; Credit Memos 656, 721). The Court, in awarding damages on this item, allowed $5,026.16 (R. 348; Finding XVII).

The Fowler Manufacturing Company, on or about February 27, 1962, gave to the appellees a private label, called "Chevron" (Ex. A-45; R. 340; Finding VII). Chevrons were identical with the other heaters manufactured by the Fowler Manufacturing Company, excepting for color of trim and data plate (R. 340, Finding VII). The appellees were allowed a five percent discount on all purchases of Chevrons (Ex. A-20, A-45). The total of sales of Chevrons from on or about February 27, 1962 to August 21, 1962 was $60,576.67 (Ex. A-20, A-45).

As soon as the agreement of September 9, 1960 expired on August 21, 1962, the appellees commenced to make substantial purchases of water heaters elsewhere (Tr. 705-707).

Appellees did not pay the August, 1962 invoices when due, and although the appellees made some additional purchases from Fowler Manufacturing Company in September and October, 1962, they paid for none of the foregoing until appellees had judgment rendered against them (R. 263, 264).

On or about the latter part of November, 1962, Mr. Copeland met with H. H. Gorlick and settlement was made, resulting in issuance of checks for all the accounts, as follows (Ex. A-8, p. 4):

Thrifty Supply Company of Tacoma, Inc.	$ 7,597.63
Thrifty Supply Company of Yakima, Inc.	4,094.62
Thrifty Supply Company of Everett, Inc.	908.20
Thrifty Supply Company of Spokane, Inc.	4,235.81
Thrifty Supply Company of Seattle	19,092.62
Thrifty Supply Company of Seattle	9,800.00
	$45,800.88

The checks were dated December 4, 1962, and before they cleared the bank the appellees stopped payment on each of them (R. 263, 264; Ex. A-8, p. 4). Suit followed and the appellees cross-claimed, seeking relief under the State of Washington Unfair Practices Act, specifically R.C.W. 19.90.040[2] (Ex. A-8, p. 6), and Consumer Pro-

2. "R.C.W. 19.90.040 *Price cutting practices forbidden—Generally.* It shall be unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, or to use any article or product as a 'loss leader', or in connection with any sale to make or give, or to offer to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, whether in the form of money or otherwise, or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make or enter into any collateral contract or device of any nature, whereby a sale below cost is effected, to the injury of a competitor, and where the same destroys or tends to destroy competition."

tection Act, specifically R.C.W. 19.86.020,[3] 19.86.030,[4] 19.-86.040[5] (Ex. A-8, p. 6). Judgment was entered on the Fowler Manufacturing Company claims and the Superior Court denied relief on the cross-claims of appellees (Ex. A-8, pp. 6, 7, 8; Ex. A-9, p. 3).

On October 28, 1964 appellees filed their cause of action in the District Court from which this appeal has been taken (R. 1). The District Court ruled all transactions occurring prior to October 28, 1960 were barred by virtue of the statute of limitations (R. 339, Finding IV).

At the time of trial, appellees introduced exhibit 13 (Tr. 285), which purported to analyze the discounts and allowances cross-appellees received from appellant, and which appellees asserted and claimed were not granted to them.

There was no attempt by appellees to introduce any evidence comparing price in terms of all discounts and allowances received by them, with all discounts and allowances received by cross-appellees, or any of them.

Appellant in this regard introduced into evidence exhibits A-13-A and A-13-B, A-53, A-55, A-66; the latter three of which were limited by the Court for impeachment purposes (R. 389), which compared the net prices paid by appellees with the net prices paid by cross-appellees (Tr. 1103, 1104, 1373, 1379, 1426).

3. "R.C.W. 19.86.020 *Unfair competition, practices declared unlawful.* Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

4. "R.C.W. 19.86.030 *Contracts, combinations, conspiracies in restraint of trade declared unlawful.* Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

5. "R.C.W. 19.86.040 *Monopolies and attempted monopolies declared unlawful.* It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce."

Appellees did not at any time bring in one of their own price lists, or record of re-sale price, nor did they call any of their salesmen, employees or customers to establish either a lowered price to meet the alleged discriminatory price difference, or loss of business proximately caused by the alleged price discrimination.

SPECIFICATION OF ERRORS

1. The Court erred in accepting the proffered concept of the respondent that the presentment of a difference in a function of price suffices to create a private litigant's claim of discrimination in price, under Section 2(a) of the Clayton act, as amended by the Robinson-Patman Act (Findings XVI, XVII; R. 347, 348.)

2. The Court erred in determining there was discrimination and erred to "assume" such discrimination did have the effect of substantially lessening or injuring competition among competitors of Fowler Manufacturing Company, as well as competition among appellees and cross-appellees and their competitors (Findings XVI, XVII, XVIII, XX; R. 347, 348, 349).

3. The Court erred in its failure to make findings relating the alleged discrimination to the evidence, showing the amount of business done by the appellees and cross-appellees with appellants during the two-year period involved, the number of heaters sold by the appellees before and after the alleged discrimination asserted by the appellees, nor any detailed analysis of "net price" differences in water heaters sold by appellants to appellees and cross-appellees (Conclusion of Law VI, R. 352).

4. The Court erred in failing to consider the effect of

"availability" of water heaters upon the alleged violation of Section 2(a) of the Clayton Act, as amended, under the evidence in this cause.

5. The Court erred, even utilizing exhibits A-53, A-55 and A-66 for impeachment purposes only, in determining there was significant price discrimination against appellees and in concluding appellant's principal defense was based on its interpretation of the September 9, 1960 agreement (Ex. 1). (Findings XVI, XVII, XVIII, XXIV; R. 347, 348, 350.)

6. The Court erred in not granting summary judgment on appellees' entire cause, rather than partial summary judgment (Finding XXI; R. 349).

7. The Court erred in determining the alleged price discrimination damaged the appellees to the extent of the price difference, without any evidence accepted by the Court establishing damage to appellees' business or property (Finding XVI, XVII; Conclusion of Law VII, VIII; R. 347, 348, 352).

8. The Court erred in entering judgment against the appellants, in favor of the appellees, in the sum of $34,-621.80, or any other sum (R. 362).

SUMMARY OF ARGUMENT

I.

The judicial definition of price, as used in the Clayton Act, as amended by the Robinson-Patman Act, is "net price." The plaintiff in such action has the affirmative burden to establish a difference in the "net price" at which the product is sold; and, the establishment of a difference in a function of price will not ordinarily be sufficient.

II.

The Court found electric water heaters distributed in the Puget Sound area at the time in question were simple in design, uniform in manufacture, and that there was little choice between the electric water heaters manufactured by the various companies distributing water heaters in the area served by appellees and cross-appellees (R. 340; Finding VII). The Court, in addition, found competition was keen. There were at least ten other manufacturers vying for the distributors' business in this territory (R. 340, 341; Finding VIII).

The Court found, too, there were at least eleven distributors other than those involved in this litigation, in the Puget Sound area, selling water heaters manufactured by others than the appellant (R. 341, Finding IX). Five of such distributors were known as the "Big Five" in the wholesale plumbing fixture business. All evidence in this cause as to prices of other manufacturers' water heaters indicated a price either as favorable or more favorable than appellant's prices. Such availability would appear on its face to dissipate any claim of damage because of alleged price difference.

III.

Exhibits A-13-A, A-13-B affirmatively established there was no discrimination of price, when utilized with the judicial concept of "net price." Exhibits A-53 and A-55, when used with the evidence explaining their limitations, created an effective impeachment of appellees' claim that appellant discriminated against appellees as to price.

IV.

Even assuming a price difference, there was no evidence that the said price difference substantially lessened or tended to injure or destroy, or prevent competition between appellant and other manufacturers, or between the appellees and any customers of appellant.

V.

A price discrimination in a highly competitive product does not create a cause of action, without anything more, for treble damages under Section 2(a) of the Clayton Act, as amended.

VI.

The appellees, by interposing defenses predicated on R.C.W. 19.90.040, and R.C.W. 19.86.020, 19.86.030 and 19.86.040 in the State court action between these same parties, chose to split their cause of action. Having been denied relief on a substantial fragment of the alleged cause of action in the State forum, appellees should not be permitted to try again in the Federal Court—a practice, if tolerated, leading to interminable litigation.

ARGUMENT

I. The Word "Price" Means "Net Price" as Used in *Robinson-Patman*. 15 U.S.C.A. 13(a):

Section 2(a) of the Clayton Act, as amended, provides in part as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular posses-

sion or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

The act does not define the word "price." The Courts and the text-writers have had occasion to define the word, as used in Robinson-Patman. In *Hoffman's Antitrust Law and Technique*, Vol. 2, at p. 415:

> "The word 'price' is not defined any place in the Clayton Act. In its ordinary meaning it signifies the net amount paid by the purchaser after deduction of discounts and allowances."

Rowe, in *Price Discrimination under the Robinson-Patman Act*, states at p. 87:

> ". . . Pertinent price for measure of statutory discrimination is actual invoice price quotation by sellers (1) inclusive of any elements of prepaid freight and (2) less any discounts or offsets against invoiced price."

In *Fruitvale Canning*, 52 F.T.C. 1504, 1520, the Commission, after stating it was concerned with the amount paid by the purchaser to the seller; and after taking into consideration all discounts, rebates and other allowances, said:

> "The fact that, in the fruit canning industry, price may mean gross price, is not controlling here, where for the purposes of inhibiting unlawful price discrimination, the principal factors are the 'net prices' and any differential that might exist as between purchasers from respondent of commodities of like grade and quality."

To isolate a segment of a price is meaningless under Section 2(a) of the Clayton Act, as amended. The net price determines whether one can compete successfully or whether the competitive process is affected.

II. Availability of a Similar Product Under the Same Terms and Conditions is a Defense to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended.

Prior to (R. 273, and 275, pre-trial order, issue of fact 9 and issue of law 9) and throughout the trial of this cause, appellant urged the trial court that availability was a defense. The Court rejected appellant's position.

> "THE COURT: Is it conceded—it must be conceded, I assume, that there were water heaters available at these prices, such as is conceded with respect to General. I don't know that there is any issue on that, is there?
>
> "MR. BENSUSSEN: No issue. Wherever possible, where there was a better price available from another supplier, we bought. We stipulate to that.
>
> "MR. KOENIGSBERG: Oh, I will not stipulate to that.
>
> "THE COURT: Well, I will sustain the objection. I don't think that it is an issue in this case. I can go so far and that is about as far as I can go and, so, you can make your objection and I will sustain the objection and allow an exception." (Tr. 1032)

Availability is a defense to alleged violations to Section 2(a) of the Clayton Act, as amended.

Frederick Rowe, an eminent authority, stated in *Price Discrimination under the Robinson-Patman Act*, p. 186:

> "The lack of a causal nexus between the challenged price and asserted detriment to competition may exist by reference to (1) intervening economic factors influencing a buyer's resale activities; (2) added

functions or offsetting costs by the low price buyer; (3) the competitive inertia of his rivals; (4) the availability of the goods at the lower price from another source."

In *Tri-Valley Packing Association v. F.T.C.*, 329 F.2d 694 (9th Cir., 1964), the defendant Tri-Valley sold and distributed canned fruits in the western part of the United States. Tri-Valley sold on the so-called "California Street Market" in San Francisco, at lower prices than to its customers who did not have a buying agency in San Francisco. Tri-Valley challenged a commission ruling unfavorable to it, on the grounds that its California price was available to all its buyers. The Court said:

> "To be more specific, if the lower price would have been available to the non-favored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the non-favored buyer paid more for the product is not the result of price discrimination but of the non-favored buyer's failure to take advantage of buying at the same low prices."

Also noted in this case is a quotation from the report of the *Attorney General's Committee to Study Anti-Trust Laws* (1955), at pages 164, 165:

> "Nor should a competitive price reduction be singled out as responsible for injury if alternative means of access to goods at the lower price are in any event available to the buyer."

This principle has also been recognized in cases involving alleged violations of the Sherman Act, 15 U.S.C.A. 1 and 2.

In *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir., 1955) Cert. denied, 350 U.S. 915 (1956) the plaintiff complained of an inability to secure titanium pigment from the defendant. The Court held:

> ". . . It appears that other pigments could be and were, used as substitutes for titanium; and appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact, they purchased immense quantities of one of such substitutes, lithopone, in 1948, buying 403,050 pounds of it in that year. *They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone.*" (Emphasis ours)

The United States Supreme Court in the recent case of *U.S. v. Arnold, Schwinn & Co.*, ... U.S. ......, 18 L.Ed. 1249, 87 S.Ct. 1856 (1967), a decision rendered subsequent to the trial of this cause, made a similar determination. In the cited case the Court was faced with the question of whether the unilateral adoption by a single manufacturer of an agency or consignment pattern for distribution could be justified under any circumstances by the presence of competition of mass merchandisers and the demonstrated need of a franchise system to meet that competition. The Court stated, page 1261:

> "But certainly in such circumstances, the vertically imposed distribution restraints – absent price fixing and in the presence of adequate sources of alternative products to meet the needs of the unfranchised—may not be held to be *per se* violations of the Sherman Act."

The Court then concluded that it was not convinced the defendant's actions constituted an "unreasonable" restraint of trade and stated:

> "Critical in this respect are the facts: (1) that other competitive bicycles are available to distribu-

> tors and retailers in the market place, and there is no showing that they are not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product; (2) that Schwinn distributors and retailers handle other brands of bicycles as well as Schwinn's; (3) in the present posture of the case we cannot rule that the vertical restraints are unreasonable because of their intermixture with price fixing; and (4) we cannot disagree with the findings of the trial court that competition made necessary the challenged program; that it was justified by, and went no further than required by, competitive pressures; and that its net effect is to preserve and not to damage competition in the bicycle market. Application of the rule of reason here cannot be confined to intrabrand competition. * * *"

Please compare sub-division (1) of the foregoing quotation with the first two sentences of the Court's Finding of Fact number VII (R. 340):

"VII

> "The electric water heater generally is simple in design, and quite uniform in manufacture. There was little choice between the electric water heaters manufactured by the various companies distributing in the territory served by the plaintiffs and by Keller Supply Company, Mesher Supply Company, and Rosen Supply Company. * * *"

Also, sub-division (2) of the quotation from the Supreme Court's opinion could apply with equal force to the case at bar as evidenced in the pre-trial order, admitted fact 36:

> "That at all times germane to plaintiff's pleadings until the issuance of checks upon which payment was stopped on or about November 28, 1962, the plaintiffs were purchasing water heaters from other manufacturers." (R. 265)

While the cases cited did not arise from alleged violations of Section 2(a) of the Clayton Act, as amended, we see nothing in either court's decision that would limit the applicability of this rule solely to Sherman Act violations. The reasoning employed applies with equal force to Robinson-Patman wherein the plaintiff must prove damages to his business or property.

There was a substantial amount of evidence to the effect appellees had available to them reasonably interchangeable products at the same or lower prices than received by cross-appellees. Exhibit A-3 is a purchase order from H. H. Gorlick, dated August 14, 1962, quoting prices of three unnamed manufacturers and alleging they were lower than appellant's. Exhibit A-4 is a letter, dated April 9, 1962, from H. H. Gorlick, quoting General prices, as quoted by cross-appellees, and indicating they were substantially below appellant's. Exhibit A-6 is a purchase order from appellee, dated August 14, 1962, with the annotation that the prices quoted were of appellant's competition.

There is testimony that appellee constantly complained about competition from the distributors not handling Fowler's products (Tr. 951, 952, 1045). There is testimony that H. H. Gorlick informed appellant that at least six of appellant's competitors were selling at lower prices (Tr. 1041). The overwhelming conclusion to be reached is that appellees had wide freedom of choice of water heaters at equally favorable or more favorable prices than were offered or sold to cross-appellees by appellant.

III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees

The Court erred in entering Finding of Fact XVI:

"XVI

"As Finding XIII indicates, the defendant, Fowler Manufacturing Company, discriminated against plaintiffs with respect to the two percent cash discount subsequent to the accord and satisfaction of May 9, 1961. From about May 19, 1961 through August 21, 1962, plaintiffs only received a one percent cash discount while the actual cash discount in effect and received by other buyers of commodities of like kind and quality as those purchased by plaintiffs was two percent. As a result plaintiffs were damaged in the amount of the difference between the one percent and two percent cash discount for said period, that is, the sum of $3,514.44." (R. 347)

The Court erred in entering Finding of Fact XVII:

"XVII

"Commencing January, 1962 through August, 1962, co-defendant, Keller Supply Company, received a two percent price discount on all water heaters purchased from the Fowler Manufacturing Company except those water heaters labeled 'Zenith' water heaters (admitted fact No. 15, pretrial order). These discounts have been referred to as special credits and are variously designated as 'quantity discount,' 'advertising discount,' and 'Republic' discount (Items (O), (P), and (J) in Exhibit 13-a). No such discount was allowed plaintiffs on similar purchases until after damages payable under the September 9, 1960 agreement had been paid in full, that is, after August 21, 1962.

"As a result of the Fowler Manufacturing Company's discrimination in the allowance of said two percent price discount to Keller Supply Company, plaintiffs were damaged in the amount of $5,026.16, which sum equals two percent of the purchase price of water heaters of the same or similar type purchased by the plaintiffs from the Fowler Manufacturing Company commencing January, 1962 through August 1962, that is $251,307.83 (Transcript, p. 521, l. 9 through p. 522)." (R. 347, 348)

The Court erred in entering Conclusion of Law VI:

"VI

"The Fowler Manufacturing Company is in violation of 15 U.S.C. §13 in that it did discriminate in the sale in interstate commerce of products of a like kind and quality by selling said products at the same time to Keller Supply Company, Rosen, Mesher and to plaintiffs at differing prices without justification. The price discriminations found were such that the effect may have been to substantially lessen or injure competition among competitors of defendant, Fowler Manufacturing Company, as well as competition among plaintiffs and Fowler's co-defendants and their competitors."

The Court erred in entering Finding XXIV:

"XXIV

"Incorporated herein are any findings that may appear in any memorandum decision that may be filed herein in support or explanation of the findings of fact and conclusions of law herein contained."

1. ***Appellant did not incorporate into the Comparative Price Schedules prepared by it the 7½% received by the appellees through the Agreement of September 9, 1960.***

In all the "net price" comparisons set forth in schedules prepared by appellant, no consideration was given to the 7½% provided to appellees by the letter agreement of September 9, 1960 (Ex. 1). The schedules referred to above are comprised of exhibits A-13-A, A-13-B, A-53, A-55.

The District Court wrote a memorandum opinion, page 5 containing the following:

"The defendants' principal defense has been based on its interpretation of the September 9, 1960 agreement."

Appellant caused to be introduced into evidence Exhibit A-13-A showing all the discounts and allowances extended to appellees from October 28, 1960 to December 1, 1962 (Tr. 1165). At the bottom of the page, containing the recapitulation of all the discounts and allowances, is the following:

> "Note: Excluded from foregoing schedule is a 7½% special credit allowed plaintiffs by Fowler Manufacturing Co., on all electric heater purchases to a maximum credit of $37,500.00 by reason of September 9, 1960 Agreement."

Appellant urged throughout the proceedings that the average net prices extended to the appellees were as favorable, if not more so, than those granted to cross-appellees; that there was no impact on competition; that the appellees failed in showing any damage to their business; that availability in this highly competitive market of a standardized product was established beyond cavil, and finally that the Superior Court action was *res judicata,* as splitting a cause of action is not permitted.

Appellant urged, and continues respectfully to do so, that the September 9, 1960 agreement placed the appellees in a more favorable position in the market place and that the appellees and cross-appellees were not on an equal basis because of said agreement. However, appellant did not intend to convey the thought it was relying principally on the agreement of September 9, 1960.

2. *Exhibits establish no significant price discrimination.*

Appellees introduced in evidence as exhibits, 13-A, 13-B and 13-C, prepared by Robert Garthwaite, a Public Accountant, to indicate discounts, freight allowances and allowances extended by appellant to cross-appellees.

Exhibit 13-A indicates the discounts, allowances and freight allowances extended to Keller Supply Company from July 22, 1960 to March 31, 1963. Exhibit 13-B covered discounts, freight allowances and allowances extended to Rosen Supply Company, and Exhibit 13-C covered the same subject matter for Mesher Supply Company. Exhibits 13-B and 13-C covered the same period as Exhibit 13-A. The totals show the discounts and allowances given to Keller Supply Company, by virtue of much larger volume, were more than those granted to the other cross-appellees, and consequently the main thrust of appellees' contentions was directed to the Keller Supply Company. Keller Supply Company purchased almost as many water heaters as the appellees.

The reason appellees used the date commencing July 22, 1960 is that the Court did not finally rule as to the statute of limitations until after the evidence was all presented. The Court eventually held that any transaction prior to October 28, 1960 was barred by the statute of limitations (R. 339). The last purchase made by the appellees from the appellant was in October 1962 (Ex. A-53) so we cannot say why the appellee extended the period to March 31, 1963.

The first prerequisite of 2(a) of the Clayton Act, as amended, is comparisons. Appellees were content to furnish schedules as to discounts and allowances extended to the cross-appellees and point to certain of them and state they did not receive the same, and rest. The Court accepted this concept in part (R. 347, Findings number XVI and XVII), and rejected it in part (R. 348, Finding XVIII). The appellee's procedure ignored the "net price" theory.

Lofquist & Mulberg, Certified Public Accountants, prepared for the appellant a comparison study of the various credits received by the appellees, and the cross-appellees for the period from October 28, 1960 to December 1, 1962. This comparison study was introduced in evidence as Exhibits A-13-A and A-13-B. Exhibit A-13-A has a detailed analysis of the credits extended to the appellees for the said period; separating into categories and supplying the dates. Exhibit A-13-B covers the same subject matter for each of the cross-appellees.

Exhibit A-13B is keyed by letter to Exhibits 13-A, 13-B and 13-C, prepared by appellees' accountant.

The recapitulation of all the credits allowed to all four for the period October 28, 1960 to December 1, 1962, are as follows:

Thrifty Supply Companies	$30,930.95	(Ex. A-13-A)
Keller Supply Company	$26,817.74	(Ex. A-13-B, p. 5)
Rosen Supply Company	$ 7,595.87	(Ex. A-13-B, p. 5)
Mesher Supply Company	$ 5,340.12	(Ex. A-13-B, p. 5)

The amount of water heater business, in dollar volume, done by appellant with the appellees and the cross-appellees, for the period October 28, 1960 to November 1, 1962, is as follows:

Thrifty Supply Companies	$531,892.82	(Ex. A-52)
Keller Supply Company	$496,864.22	(Ex. A-52)
Rosen Supply Company	$140,112.82	(Ex. A-52)
Mesher Supply Company	$ 89,614.90	(Ex. A-52)

The foregoing dollar volume schedule does not take into account the 1% or 2% cash discounts for prompt payment, nor the following miscellaneous credits:

Thrifty Supply Companies	\$ 5,258.16 (Ex. A-51)
Keller Supply Company	\$ 455.60 (Ex. A-51)
Rosen Supply Company	\$ 170.00 (Ex. A-51)
Mesher Supply Company	\$ 291.28 (Ex. A-51)

The dollar volume figures when adjusted by the 1% and 2% discounts for prompt payment and the miscellaneous credits, are:

Thrifty Supply Companies	\$519,616.41
Keller Supply Company	\$486,926.94
Rosen Supply Company	\$137,140.58
Mesher Supply Company	\$ 87,531.34

The relative percentages of the foregoing credits to the total amount of purchases of water heaters from appellant is approximately:

Thrifty Supply Companies	5.95% of purchases
Keller Supply Company	5.51% of purchases
Rosen Supply Company	5.54% of purchases
Mesher Supply Company	6.10% of purchases

We set forth hereafter the recapitulation of Ex. A-13-A, which shows the credits allowed to Thrifty Supply Companies for the period October 28, 1960 to December 1, 1962, to demonstrate the many types of credits extended as a result of appellant endeavoring to meet the pressures exerted for price by appellees:

THRIFTY SUPPLY COMPANIES
CREDITS RECEIVED FROM
FOWLER MANUFACTURING CO. APPLICABLE TO THE PERIOD OCTOBER 28, 1960 TO DECEMBER 1, 1962

RECAPITULATION

(A)	*Freight Allowances*—November 1960 to June 1962			
	1.50 cwt on electric units; 0.66 cwt on gas; 1.00 cwt; 2.00 each; 0.36 cwt.			
	Special allowances per Credit Memos			$10,603.04
(B)	*Cash Discounts*			
	2% (invoices marked 2%)		$ 377.04	
	2% (invoices marked 1%)		2,486.20	
	1% (invoices marked 1%)		4,408.53	
	2% (taken on checks not honored)		934.71	
	2% (taken on purchases not covered by checks)		19.22	8,225.70
(C)	*Product—Related Credits*			
	January 20, 1961 to February 24, 1961 "Special Allowance inventory clearance" (A-15)			
	307 units of #52-109 @ $3.70	$1,135.90		
	60 units of #52-109 @ 4.42	265.20		
	133 units of #52-203 @ 3.70	492.10		
	36 units of #52-203 @ 4.42	159.12	$2,052.32	
	March 1962 to July 1962 "Price Adjustment per Agreement" "Chevron" units (A-20)		2,484.57	
	August 1962 to December 1962 "Price Adjustment per Agreement" "Chevron" units and Fowler units (A-21)		1,524.84	
	July 1962 to August 1962 Warehouse sales allowances			
	465 units, 52-gallon heaters @ 1.00 each; indicated on invoices		465.00	6,526.73
(D)	*Special Credit*			
	April 26, 1961 "Promotional allowance—during 30-day promotional period" 84 heaters @ $3.70 each (A-17)			310.80
(E)	*Credit in Full and Complete Settlement of All Claims*—May 9, 1961 (A-1)			4,639.68
(F)	*Price Adjustment*—November 4, 1960 500 heaters @ $1.25 each (A-18)			625.00
	TOTAL ALL CREDITS			$30,930.95

Note: Excluded from foregoing schedule is a 7½% special credit allowed Plaintiffs by Fowler Manufacturing Co., on all electric heater purchases to a maximum credit of $37,500.00 by reason of September 9, 1960 Agreement.

Exhibit 13-A, prepared by Robert Garthwaite, showing the credits extended to Keller Supply Company in the sum of $38,161.58, whereas Exhibit A-13-B, prepared by Lofquist & Mulberg, shows credits extended to Keller Supply Company to be $26,817.74, does not mean there is a variance between the accountants, but rather that the period covered by Robert Garthwaite (Ex. 13-A) is from July 22, 1960 to March 31, 1963, whereas, the period covered by Lofquist & Mulberg is from October 28, 1960 to December 1, 1962 (Ex. A-13-B). The Court has cut off any claims arising prior to October 28, 1960. There were no purchases made by appellee after October, 1962. When we consider all the credits against all the purchases in the case as to the two large buyers, appellees and Keller Supply Company, we find there is a slight advantage in favor of the appellees, without in any manner considering the $37,500 the appellees received when they were given the benefit of the 7½% provided by Exhibit 1.

The appellant introduced in evidence Exhibits A-53, A-55 and A-66 (Tr. 1376, 1426). The Court limited their use for impeachment purposes (R. 389).

Ballentine's Law Dictionary, 2d Ed., p. 610, defines "impeach" as follows:

> "Impeach—To impeach is defined by Webster's New International Dictionary as to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to."

The purpose of Exhibits A-53, A-55 and A-66 was to call in question, challenge, as well as impute fault and defect to the procedure utilized by appellees to establish a difference in price, and in effect discredit the alleged price difference.

In Exhibits A-53, A-55 and A-66 only sales made in the same month were compared. For example, if the same model was purchased during the same month by appellees, and any one of the cross-appellees, it was compared. However, a purchase made in one month by appellees was not compared with a purchase made by a cross-appellee in preceding or subsequent months (Tr. 1378, 1379). Again, as in the comparison made by Lofquist & Mulberg on Exhibits A-13-A, A-13-B, the 7½% provided by Exhibit 1 was not considered.

In order to have a fairly accurate comparison, using Exhibits A-53 and A-55, the latter of which is a recapitulation of Exhibit A-53, it is necessary to make certain adjustments. As the main thrust of appellees is aimed at the other large buyer, we shall confine the present study of Exhibits A-53 and A-55 to appellees and cross-appellee Keller Supply Company. The following are adjustments which will give, in our opinion, an approximately true picture of the comparative net prices over the two-year period:

(1) Total amount in price differential on comparative sales in favor of Thrifty Supply Companies is $1681.13 (Ex. A-53, A-55).

(2) Cash discount differential for prompt payment from May, 1961 to August 21, 1962, is $3514.44 (Ex. A-56).

(3) On cross-examination appellees disclosed errors made in computation by appellant in favor of Keller Supply Company, amounting to $1247.10 (Tr. 1460, ll. 8-22; 1538, ll. 2-19; 1539, ll. 7-13; 1595, ll. 15-24; 1600, l. 23 to 1601, l. 3).

(4) Miscellaneous Credits:

Keller Supply Company	$ 455.60	(Ex. A-51)
Thrifty Supply Companies	$5,258.16	(Ex. A-51)

As the appellees' miscellaneous credit is comprised primarily of credit memo 321 (Ex. A-1), for $4,639.68, we should point out that this credit memo was to adjust what the appellees were claiming cross-appellees received by way of discounts.

The Court entered Findings of Fact XV, part of which is as follows:

"XV

"On or about May 1, 1961, after learning of the various allowances granted Keller, Rosen and Mesher, the plaintiffs became delinquent in the payment of their account. The March and April accounts were in excess of $40,000.00, of which approximately $35,000 was for delinquent invoices for March. Gordon Copeland, a Fowler Manufacturing Company executive at said time, sought payment from Harold Gorlick. On May 8, 1961 payment was obtained, and simultaneously a debit memo (Exhibit 39) was issued. On the following day the Fowler Manufacturing Company issued its credit memo 321 for $4,639.68 (Ex. A-1). Said credit memo was received by the plaintiffs and no objection or exception was to the terms set forth in credit memo 321.

"The credit memo does not detail the items for which the allowances were made. The credit memo was for a substantial amount and contains the following language:

" 'Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.

" 'The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims.

" '$4,639.68' " (R. 346)

The Court concluded credit memo 321 constituted an accord and satisfaction of appellees claims to May 9, 1961.

It is obvious from the Court's finding, as a basis for the issuance of the large credit of $4,639.68, H. H. Gorlick was making claims to Gordon Copeland about the cross-appellees receiving discounts and allowances. The result was that Gordon Copeland agreed to issue a credit memo for $4639.68, and appellees issued a check paying its accounts and making them current.

H. H. Gorlick's own testimony indicates the nature of the transaction. In cross-examination counsel had occasion to ask if the witness had answered a specified question in his deposition of September 26, 1966:

"Q. Did you answer as follows:

> 'A. Well, I just answered that, after that disagreement was cleared up, I did, because it has been necessary in doing business with the Fowler Manufacturing Company to hold money to get a settlement of things that were in disagreement. That is our history of having done business with that company from the midpoint of 1960 on through 1962.'

"Q. Did you answer it that way?

"A. Yes." (Tr. 585, l. 18 to 586, l. 4.)

Carl Strutz, employed by appellant for 21 years at the time he testified (Tr. 1303) and then Vice-President and General Manager of the Company (Tr. 1303) stated that defective merchandise was adjusted promptly (Tr. 1327) and that in any event defective merchandise did not average over two-thirds of one percent (Tr. 1321) and also stated mathematical errors would be taken care of promptly (Tr. 1326).

Before demonstrating the over-all figures for the two-year period favored Thrifty Supply Companies over Keller Supply Company, without considering the agreement of

September 9, 1960, we call attention to two credit memos which in and of themselves are almost large enough to balance out the two percent trade discount referred to in the Court's Finding XVII (R. 347, 348).

Carl Strutz testified that Fowler, Chevron, Viking, Zenith and Republic water heaters were all manufactured at the Fowler Manufacturing Company plant, and they were all the same except for color of paint and data plate (Tr. 1312).

In *Borden v. F.T.C.*, 339 F.2d 133, 135 (5th Cir., 1964), the Court stated:

> "The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show the milk was packed or in any manner handled by Borden."

The case was appealed to the Supreme Court, *F.T.C. v. Borden,* 383 U.S. 637, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966), wherein it was held:

> "Labels do not differentiate products for the purpose of determining grade or quality, even though one label may have more customer appeal and command a higher price in the market place from a substantial segment of the public."

It is clear, we submit, in determining "net price", in view of the foregoing, in the instant case no attention need be paid to labels.

The difference in the cash discount referred to in Finding XVI occurred from May, 1961 to August 21, 1962, and the two percent trade discount extended to Keller Supply Company referred to in Finding XVII commenced in December, 1961. The total of these discounts, if applied to the water heater purchases of the appellees, amounts to the sum of $8,540.60 (Conclusion VII, R. 352).

From March, 1962 to July, 1962 appellees were receiving credits of five percent on Chevron, amounting to $2,484.32 (Ex. A-13-A, A-20) and from August, 1962 to December, 1962 one, two, three and five percent credits on Fowlers and Chevrons, amounting to $1524.84 (Ex. A-13-A, A-21). These alone amount to $4009.16. The foregoing credits are shown under letter "C" of Exhibit A-13-A.

Taking into account all adjustments, Exhibits A-53 and A-55 establish the difference in "net price" paid by Keller Supply Company and appellees for the pertinent two-year period, to be as follows:

(1) Difference in prices are in favor of Thrifty Supply Companies when compared with Keller Supply Company (Ex. A-53, A-55)		$1681.13
(2) Cash discount difference of 1% favoring Keller Supply Company, for the period of May, 1961 to August 21, 1962 (Ex. A-56)	$3514.44	
(3) Mathematical errors in Exhibits A-53, A-55, favoring Keller Supply Company (Ex. A-51)	1247.10	
(4) Miscellaneous credits, Keller Supply Company	455.60	
Miscellaneous credits, Thrifty Supply Companies		5258.16
	$5217.14	$6939.29
		–5217.14
Net price difference, showing the amount of additional money Thrifty Supply Companies would have paid over the two-year period, if charged the same prices as Keller Supply Company		$1722.15

Appellees may assert that Exhibits A-53 and A-55, while setting forth all the sales made by appellant to appellees and cross-appellees, do not compare them all. This is true, as sales were only compared if made within the same month. However, the comparisons contain the large bulk of the sales, and it is only fair to assume any more detailed analysis would expand the difference already shown in favor of the appellees.

IV. Price Discrimination Alone in a Highly Competitive Market, Does Not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition.

The Court erred in permitting an assumption to fulfill the requirement of evidence as to substantial lessening or injuring competition. The Court made the following Finding of Fact:

> "XX
>
> "The precise effects of the price discriminations found to exist upon competition in the manufacture and sale of electric hot water heaters are difficult to ascertain. However, it is reasonable to assume in the highly competitive market involved that such discrimination did have the effect of substantially lessening or injuring competition among competitors of Fowler Manufacturing Company as well as competition among plaintiffs and Fowler's co-defendants and their competitors."

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was aimed at protecting the small buyer from the competitive power of the large buyers. Chain-store buyers, with their ability to distribute large quantities of any marketable product, were the primary targets of Robinson-Patman.

Thus, Phillip Elman, a Federal Trade Commissioner, in an article recently appearing in 42 Washington Law Review 1 (October, 1966) entitled "*The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal,*" states at page 5:

> "As the Supreme Court stated in the *Sun Oil* case, 'Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.'
>
> "Given an imperfect world, such a design involves no necessary inconsistency with basic antitrust policy, since the 'competition' sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly. Thus, the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals."

The situation is reversed in the case at bar. The appellees are the largest buyer from the appellant in the State of Washington, and the largest buyer of the four involved in this litigation (Tr. 1018).

The District Court characterized the appellant's actions in the hot water heater market in Finding number XII (R. 344):

> "XII
>
> "While the Fowler Manufacturing Company issued price lists from time to time, established prices frequently varied from the published prices. Moreover, the plaintiffs and Fowler Manufacturing Company's co-defendants often requested the Fowler Manufacturing Company to deviate from the published price list allegedly to meet competition, and these requests were frequently granted. Often these deviations took

the form of special quotes; at other times freight allowances were granted; and on other occasions special allowances in lieu of cost of delivery were made. At times the Fowler Manufacturing Company accepted protective orders and back orders—to protect the purchaser against a change in the published price list. At times Fowler would reduce prices for inventory clearances, or allow a discount for promotion of a label. The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market."

Commissioner Elman, in 42 Washington Law Review, *supra,* states at page 11:

". . . A difference in price might confer some transient advantage upon a favored buyer and yet at the same time reflect healthy and vigorous competition at the seller level—the so-called primary line—or the initiation of a much needed price break at the seller level. Moreover, temporary and shifting price discriminations, even of a substantial nature, are not necessarily injurious to competition but may reflect instead the kind of bargaining and haggling which is an essential part of the competitive process. In competitive markets some buyers may obtain a price advantage on one item while others obtain a counterbalancing advantage on another. Where there is no central pattern in these discriminations, where they are temporary or sporadic, or where they tend to cancel each other out, they are not likely to produce any harmful effect upon the competitive process. To the contrary, they merely reflect varying pressures within a vigorous and healthy competitive market. * * *"

In *Crest Auto Supplies, Inc. v. Ero Mfg. Co.,* 360 F.2d 896, 901 (7th Cir., 1966) the Court stated:

"It is clear that one of the elements of a violation of 2(a), as amended, by the Robinson-Patman Act, *is the requisite competitive effect* and that price differentials alone are not enough."

The Court admitted in the instant case that it was difficult to ascertain the exact competitive injury but assumed because competition was aggressive that this injury existed.

The Court was not in position to evaluate the competitive effect as appellees did not offer any acceptable evidence that the alleged discrimination had any effect upon competition. We urge, the reason for this void is there was no effect.

To accept the Court's assumption, based on the mere fact of "highly competitive market," is to read the requirement of substantial lessening or injuring competition out of the Robinson-Patman Act.

It should also be stated that the District Court, in finding there was injury to competition between appellant and its competitors, decided a question never in issue. An examination of appellees' complaint and the pre-trial order indicated that appellees never urged that competition at the manufacturer's level suffered an injury. The only evidence on Fowler's competitors is that they existed, that they sold the same product at the same or lower prices, and that they were aggressively competing for the same business. There was not any evidence concerning appellant's competitors' sales volume, or their competitors' inability to sell to appellees or cross-appellees, injury to their business, or any of the other factors relevant to the concept of injury to competition.

The first indication any of the litigants had that the Court was considering injury to competitors of the appellant was when the Court handed down its Findings of Fact and Conclusions of Law.

V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting From the Alleged Price Discrimination

The appellant has previously set out Findings of Fact XVI and XVII in connection with Section III of the appellant's argument. The pertinent portions of the two findings to be considered in the instant argument and upon which appellant predicates error, are:

"XVI.

". . . As a result plaintiffs were damaged in the amount of the difference between the one percent and two percent cash discount for said period, that is, the sum of $3,514.44."

"XVII.

"* * *

"As a result of the Fowler Manufacturing Company's discrimination in the allowance of said two percent price discount to Keller Supply Company, plaintiffs were damaged in the amount of $5,026.16, which sum equals two percent of the purchase price of water heaters of the same or similar type purchased by the plaintiffs from the Fowler Manufacturing Company commencing January, 1962 through August, 1962, that is $251,307.83 (Transcript, p. 521, l. 9 through p. 522)."

The Court erred in making its Conclusions of Law VII and VIII:

"VII.

"As a result of said violation, plaintiffs have been damaged in the amount of $8,540.60. This amount will be trebled pursuant to 15 U.S.C. §15 and plaintiffs shall have judgment against the defendant, Fowler Manufacturing Company, in the amount of $25,621.80."

"VIII.

"Pursuant to 15 U.S.C. §15 plaintiffs shall also

> have judgment against the defendant, Fowler Manufacturing Company, for costs, including reasonable attorney's fees, the amount of which shall be determined after a hearing."

The text of 15 U.S.C.A., § 15, is as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The burden placed upon a litigant in a private treble-damage action under Section 2(a) of the Clayton Act, as amended by Robinson-Patman, is characterized in 2 Hoffman, *Anti-trust Law and Practice*, at p. 452:

> "In a private action for injunction or recovery of damages, the plaintiff cannot rely on the inference of reasonable possibility or even a probability of injury. He must allege and prove that the wrong violating the act was the proximate cause of ascertainable damage to business and property."

Flintkote Company v. Lysfjord, 246 F.2d 368, 392 (9th Cir., 1957) Cert. den. 355 U.S. 835 (1958), stated it in the following manner:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue."

This rule has also been upheld in *Momand v. Universal Film Exchange*, 172 F.2d 37 (1st Cir., 1948); *E. V. Pren-*

tice Mach. Co. v. Associated Plywood Mills, 252 F.2d 473 (9th Cir., 1958) Cert. denied, 356 U.S. 951 (1958); *Talon, Inc. v. Union Slide Fasteners, Inc.*, 266 F.2d 731 (9th Cir., 1959); *Story Parchment Co. v. Patterson Paper Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946).

Appellees' theory was that they were injured at least in the amount of the alleged price difference, nothing else appearing. They also claimed damages in the form of lost profits and business, but the evidence produced on the latter was not acceptable to the Court (Finding XIX, R. 347, 348).

Appellees' theory of damages admittedly found some acceptance in the early decisions under Section 2(a) of the Clayton Act, as amended. However, a forceful opinion by Judge Learned Hand, in *Enterprise Industries v. Texas Co.*, 240 F.2d 457 (2d Cir., 1957) Cert. denied 353 U.S. 965 (1957), states the better and more widely accepted rule of law. The trial court, in *Enterprise Industries,* had assessed damages by accepting as a measure of plaintiff's loss the difference in price. Judge Hand considered the trial Court's ruling in light of Congressional intent:

> "At all events the statute should not be read as creating any presumption that 'where the fact of damage is shown . . . the pecuniary amount or equivalent of the prohibited discrimination' is the proper 'measure of damages'. Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Congr., 2nd Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention

of that part of §13(b) that imposes a burden of proof on the seller as to the effect of a 'discrimination'. Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors; especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also must pay him a fine in double the amount of the loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear."

As to the question of how damages should be measured, the Court's opinion quoted Justice Cardozo in *I.C.C. v. U.S.*, 289 U.S. 385, 77 L.Ed. 1273 (1933):

> "'If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered * * * price * * * damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more.' 289 U.S. at pages 390, 391, 53 S.Ct. at page 610. 'Overcharge and discrimination have very different consequences, and must be kept distinct in thought.' 289 U.S. at page 390, 53 S.Ct. at page 609."

The Court then decided the plaintiff produced no evidence that demonstrated his injury. This concept has been widely accepted in the cases which succeeded *Enterprise Industries v. Texas Co., supra,* involving Robinson-Patman.

In *Alexander v. Texas Co.*, 165 F. Supp. 53 (W.D. La., 1958), the Court held that the complaining service station operator must support alleged lost business to a favored dealer with reliable figures. The Court also mentioned the plaintiff made no attempt by reliable figures or otherwise to deduct from "gross loss" any added profit he may have made by passing the prise rise to customers. The appellees in the case at bar did not produce in evidence accepted by the District Court, one figure, or any exhibit such as their own price lists, or one witness as to damage to their business or property, other than the alleged price difference.

In *Kedd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir., 1961), it was established that a filling station operator paid more for his gasoline than his competitors. There was no showing however that his competitors, who sold in a nearby area, lowered prices, or that the operator lost any customers. The Court denied him damages of a price differential. Most assuredly, there was not in the case at bar any attempt made by appellees to show that competitors lowered prices, nor was any evidence produced at trial that appellees lost a single customer on account of the alleged discrimination in price.

In *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146, (D.C., Ore., 1958) the Court was faced with the same problem. Using the *Enterprise Industries v. Texas Co.* case, 240 F.2d 457, (2d Cir., 1957) as precedent, the Court held:

> "In the Enterprise case, Judge Learned Hand held that plaintiff must show that the price discrimination actually diverted customers to the favored dealers, or forced plaintiff to lower his retail price in order to compete. He pointed out that the question is not how much better off plaintiff would be if he had paid a

lower price, but how much worse off he is because others have paid less."

In *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir., 1955), a case pre-dating *Enterprise v. Texas Co.*, 240 F.2d 427 (2d Cir., 1957), the Court was faced with an alleged price-fixing conspiracy. The Court held:

> "As to the claimed price fixing conspiracy, there is no proof that appellants sustained any injury as a result of appellees' conduct or alleged conduct. Even assuming that appellees were engaged in such a conspiracy, there is no evidence that prices were fixed at a higher level than would have been the competitive price, in the absence of price fixing, and that they were damaged by paying the higher prices, and lacking such evidence, there would be no proof of injury. * * *"

In *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 734 (9th Cir., 1959) the Court stated:

> "Implicit in the conclusion of the district court that Union failed to prove injury to its business or property is the finding by the trial court that Union had not sustained the burden of proof resting upon it to establish that Talon's unlawful acts were the proximate cause of Union's loss of profits. The only ruling of the district court occurring during the trial of which Union complains in its brief relates to the rejection of Union's offer of proof of loss of profits. No attempt or offer of Union was made to show that it sold less zipper machines or less zippers, or that it was forced to sell its machines or zippers at reduced prices, or that it was otherwise impaired or adversely affected in its business, because of the unlawful acts of Talon."

H. H. Gorlick, the primary complaining witness, did state that he always met competition. Significant in this connection he never did state he lowered his price, nor did he produce any price list showing that he did, nor did he produce one invoice to indicate he lowered his price to meet the competition in any of appellant's products.

Appellees ran a profitable enterprise during the period of alleged discrimination (Ex. A-33; A-34). They competed successfully in the market place. They sold considerably more electric water heaters during the two-year period involved than in the preceding year or subsequent years (Tr. 1560):

1960	5,579 water heaters
1961	6,902 water heaters
1962	7,341 water heaters
1963	5,741 water heaters
1964	5,582 water heaters
1965	figures not available.

Success of this nature is hardly consonant with claims of injury.

The Court, on pages 6, 7 of the Memorandum Opinion, states:

> ". . . The evidence establishes without doubt, if not tacitly admitted by defendants, that Thrifty did meet competition of the co-defendants and lost profits by meeting such prices at least to the extent of the difference in cost of the water heaters sold by Thrifty, and cost of the water heaters sold by co-defendants."

Appellant contended throughout the trial and in a brief submitted thereafter (R. 318-321) that there was no showing by appellees that any injury had been sustained, utilizing much the same authorities as set forth herein. Fred Fowler, former President of appellant, testified that at a meeting in November of 1960 there were complaints from cross-appellees that appellant was underselling them (Tr. 939, 940). Exhibit A-59 demonstrated that appellees were offering their customers six percent for cash. William Buterbaugh, an employee of appellees until January 1, 1961, testified until he left the employ of appellees he used exhibit A-59 as an inducement to make sales (Tr. 1410). There was no showing this practice was discontinued. There was no indication any of the cross-appellees made the kind of offer in exhibit A-59 to their customers.

Appellant contended, as the Court stated, that appellees met competition or undersold it. Injury to business or property, however, can only be sustained upon a showing of a lowered price to meet competition or a loss of business.

In connection with this, we suggest that the $37,500 received by appellant was a windfall. The Court's own findings indicate that the electric water heaters sold by the various manufacturers are essentially the same product, and that the market is aggressive. Thus the competition plaintiff received from cross-appellees would be just as vigorous no matter what brand they were selling. As an example, one of appellees' bitterest complaints, graphically illustrated by Exhibit A-4, dated April 9, 1962, was on the prices at which cross-appellees were selling General water heaters, and not water heaters manufactured by the appellant. Because of this product interchangeability, it is most doubtful that an exclusive on any one brand is worth very much. It was appellant's contention that appellees got equal or better treatment from appellant, notwithstanding the $37,500. With it, it is rather obvious they could undersell cross-appellees.

There being no acceptable evidence introduced by appellees on the question of damage to appellees' business or property, the case should have been dismissed for failure to produce evidence which sustains a private treble-damage cause of action under the Clayton Act, as amended by the Robinson-Patman Act.

VI. Splitting a Cause of Action Constitutes a Bar.

The appellant, in the Superior Court of the State of Washington for King County did commence a cause of action, cause number 599283, entitled: Fowler Manufacturing Co., a corporation, vs. Harold Gorlick and Jane Doe Gorlick, his wife, and Morris Gorlick and Jane Doe Gorlick, his wife, d/b/a Thrifty Supply Company; and, Thrifty Supply Co. of Everett, Inc.; Thrifty Supply Co. of Spokane, Inc.; Thrifty Supply Co. of Tacoma, Inc.; Thrifty Supply Co. of Yakima, Inc. Appellant in said cause was seeking to recover on six checks upon which appellees stopped payment, dated December 4, 1962, totaling $45,-800.88 given in payment of water heaters sold to the appellees from on or about August, 1962 to the last of October, 1962 (Ex. A-8, p. 4).

Appellees herein caused to be joined in said action the cross-appellees as additional defendants, and did thereupon file their cross-claims seeking to recover on alleged violation of R.C.W. 19.90 entitled "Unfair Practices Act" the sum of $65,000 and attorney fees and costs, and on alleged violation of R.C.W. 19.86 $65,000 plus attorney fees and costs (Ex. A-7, p. 2, 3, 4, 5).

After trial, in which appellant was awarded judgment (Ex. A-9) against the appellees for the price of the water heaters covered by the said checks, payment of which was stopped, the Court entered Findings of Fact, Conclusions of Law and Judgment (Ex. A-8, A-9). The Superior Court included in its Findings those numbered VIII,[6] IX,[7] X[8] and XI,[9] which embraced the statutes mentioned therein.

The Court entered judgment, embodying the following:

> "Ordered, Adjudged and Decreed that the cross-claims of the defendants be and they are hereby dismissed with prejudice" (Ex. A-9).

The District Court, upon appellant's motion for summary judgment (R. 74) did conclude, in view of R.C.W. 19.86.030 and R.C.W. 19.86.040 that the State Court judgment was res judicata because the foregoing cited State statutes were in essence the counter-part of Sections 1 and 2 of the Sherman Anti-trust Act, and granted summary judgment in part only, allowing the appellees to pursue their claim of violation of the Clayton Act, as amended by Robinson-Patman, U.S.C.A. 13 and 13(a)—in short, allowing the appellees to split their cause of action.

---

6. "VIII

That in the cause of action herein for the recovery of money for goods sold and delivered, the said defendants did make Howard Keller, Keller Supply Company, Inc., Max Rosen and Norman (Nate) Mesher, additional defendants and did interpose cross-complaints against the plaintiff and said additional defendants, confining the same to R.C.W. 19.90.040, 19.86.020, 19.86.030, and 19.86.040."

7. "IX

The depositions of the principal defendants, their pleadings, their answers to interrogatories and all the statements made by counsel for the defendants, including an opening statement, did not produce any justiciable issue on the cross-claims predicated on R.C.W. 19.90.040."

8. "X

Considering the depositions, answers to interrogatories, pleadings, opening statement and other statements by defendants' counsel, it affirmatively appears there is no justiciable issue on any alleged violations of R.C.W. 19.86.030 and R.C.W. 19.86.040."

9. "XI

Considering the depositions, the answers to interrogatories, pleadings, opening statement and others by counsel for defendants, and accepting everything as true, there is no justiciable issue as to violation of R.C.W. 19.86.020 as no private action for any of the relief sought lies under said provision, as reflected by R.C.W. 19.86.090."

In *F. L. Mendez Co. v. General Motors Corporation*, 161 F.2d 695 (7th Cir., 1947), the Court stated:

> "He is not at liberty to split up his demand and prosecute it piecemeal, or present only a portion of the grounds and leave the rest to be presented in a second suit if the first suit fails; such practice would lead to endless litigation.

Another cogent case is *Williamson v. Columbia Casualty and Electric Corporation*, 186 F.2d 464 (3rd Cir., 1950). In this case the first complaint alleged Sherman Act violations; the second, Clayton Act violations. The only difference between the allegations made in the first and second suit was that the first included that of conspiracy. Once a determination was made unfavorable to the plaintiff on the basis of the Clayton Act, the Court held that his action on the Sherman Act was barred by reason of *res judicata*. The Court said that the fact different statutes are relied upon does not make the claims different. To the same effect is *Engelhard v. Bell and Howell*, 327 F.2d 30 (8th Cir., 1964).

There is one case, *Lyon v. Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir., 1953) cert. denied, 345 U.S. 923 (1953), which is contra to appellant's contention on this point. There have been three Law Review articles which have questioned the validity of the case. In 69 Harvard Law Review, 573 (1956), it was stated that the *Lyon* opinion was inconsistent with the necessary implication of U. S. Supreme Court decisions in the patent field, especially *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388, 73 L.Ed. 752 (1929). This article also questioned the validity of the majority's conclusion that the uniform need for application of the anti-trust laws required a finding that a state court's decision would not be *res judicata* to a Federal Court action under the Federal anti-trust laws.

In 31 N.Y. U. Law Review 955 (1956), it is stated that there is no clear majority holding in the *Lyon* case. The article also points out this case used questionable distinctions to avoid the *Becher v. Contoure Laboratories, Inc.* case, *supra.*

8 Stanford Law Review 439 (1956) is the most extensive comment on the case. Its conclusion is particularly cogent, page 451:

> "Exemption from the effect of state court anti-trust proceedings must ultimately be founded upon interpretation of the anti-trust acts. It is to be wondered, then, whether a legislative policy so tenuously inferred ought to override a policy so firmly established and long recognized by the courts—that of *res judicata*—without more explicit legislative provision."

The article also states the following as a worthy argument in favor of the estoppel rule:

> "The dilemma facing the state court defendant considering whether to embark his claim as a defense, is very much eased by the fact that he might recover as damages in a later anti-trust action thrice the amount he lost in the state court. Hence when the claimant has chosen to interpose the defense he should not be heard to complain that the Federal courts are no longer open to him." (p. 450).

In *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820 (9th Cir., 1963) the Court examined the *Lyon* case, noting there was a dissent, and neither accepted nor rejected the reasoning of the opinion. In footnote 17, page 832, it is stated:

> "In his opinion on petition for rehearing Judge Hand indicated that after studying Becher v. Contoure Lab-

> oratories, 279 U.S. 388, 49 S.Ct. 356, 73 L.Ed. 752, he had concluded that it would be possible for findings of fact in the state court to operate as an estoppel in the action in the federal court and thus put an end to plaintiff's claim. He went on to conclude that the particular state court judgment there involved could have no such effect."

CONCLUSION

There was little choice in water heaters being offered by the various manufacturers distributing water heaters in the Puget Sound area. The prices quoted by them were at prices equal to or below those granted to the alleged favored buyers of Fowler Manufacturing Company. In a highly competitive market on such interchangeable item, availability would neutralize the impact of any price difference, such as asserted in the instant case, extended by one manufacturer to any of its customers. Especially is this true in the case of the appellees, who were at all times selling water heaters manufactured by others than appellant.

In any event, the evidence established over the two-year period involved that the "net price" slightly favored the appellees over their large buyer competitor, Keller Supply Company. This conclusion is reached without in any manner giving consideration to the agreement of September 9, 1960. The agreement in question placed the appellees in an advantageous market position.

The price differences established, at times favoring the appellees and at other times the cross-appellees, in the highly competitive market, were temporary, shifting and sporadic, a pattern which tends to cancel one price advantage against the other, and contradict any contention as to lessening or injuring competition.

The appellees failed to sustain the burden of proving they at any time lowered their price to meet an alleged price discrimination, or that they lost any customers by the alleged price discrimination, and hence failed to establish damage to their business or property.

The appellees chose to interpose their anti-trust claims in the State Court case instituted by appellant. The anti-trust claims, predicated on alleged facts which are the same or similar to those advanced in the instant case, having been dismissed with prejudice, should be barred. To hold otherwise is to permit splitting a cause of action—a practice which leads to interminable litigation.

Respectfully submitted,

KOENIGSBERG, BROWN & SINSHEIMER
By L. M. KOENIGSBERG
Attorneys for Appellant and Cross-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. M. KOENIGSBERG
Of Attorneys for Appellant and Cross-Appellees

APPENDIX

TABLE OF EXHIBITS

Plaintiffs:

Number	Marked:	Offered:	Admitted:	
1	R. 280	26	26	
2	R. 280	28	30	
3	R. 280	227	227	
4	R. 280	49	49	
5	R. 280	65		
10	R. 280	75	75	
11-A	1074	1074	1075	
12	R. 280	68	69	
13-A	304	327	328	
13-B	375	376	376	
13-C	377	378	381	
16	R. 280	64	64	
17	R. 280	35	35	
18	7	8	10	
19	R. 280	11	14	(rejected)
20	10	11	11	
21	10	11	11	
22	10	11	11	
23	10	11	11	
24	10	11	11	
25	10	11	11	
26	14	15	16	
27	14	16	17	
28	17	18	18	
29	18	19	19	
30	23	23	24	

TABLE OF EXHIBITS (Continued)

Plaintiffs':

Number	Marked:	Offered:	Admitted:
32	220	222	
33	724	724	725
33-A	1110	1110	1110
34	46	48	48
35	429	430	430
36	429	463	463
37	473	724	725
38	476	476	476
39	716	717	717
40	737	775	775
41-AB	740	775	775
41-C	767	768	768
41-D	817	817	818
42	772	774	774
43	808	808	808
44	845	845	846
45-A	849	856	856
46	872	872	872
47	987	987	987
48	993	996	998 (rejected)
49	1264	1264	1264
50	1469	1470	1471
51	1470	1472	1473
51-A	1476	1476	1476

TABLE OF EXHIBITS (Continued)

Defendants':

Number	Marked:	Offered:	Admitted:
A-1	R. 280	564	564
A-1-A	1138	1138	1140
A-2	R. 280	581	582
A-3	R. 281	616	619
A-4	R. 281	625	626
A-5	R. 281	620	621
A-6	R. 281	623	624
A-7	R. 281	1421	1421
A-8	R. 281	1421	1421
A-9	R. 281	1421	1421
A-13-A	1143	1165	1166
A-13-B	1168	1168	1186
A-14	R. 281	594	595
A-15	R. 281	611	614
A-17	R. 282	1136	1137
A-18	R. 282	642	643
A-18-1	644	645	645
A-20	R. 282	1130	1130
A-20-A	1112	1113	1113
A-21	R. 282	1112	1113
A-24	R. 282	572	572
A-28	R. 283	1031	1032 (rejected)
A-29	R. 283	1544	1544
A-30	R. 283	1544	1544
A-31	R. 283	1544	1544
A-32	564	564	565
A-33	1222	1222	1222
A-34	1222	1222	1222
A-35	382	383	384
A-36	456	456	460

TABLE OF EXHIBITS (Continued)

Defendants':

Number	Marked:	Offered:	Admitted:
A-36-A	457	460	460
A-37	630	634	634
A-38	692	694	694
A-39	694	695	696
A-40	696	696	696
A-41	1302	1302	1302
A-42-A-1	1021	1158	1159
A-42-A-3	1274	1274	1274
A-42-C-1	1589	1589	1589
A-43	1021	1211	1212
A-43-A	1210	1211	1211
A-45	1078	1079	1079
A-48	1308	1311	1312 (rejected)
A-50	1352	1352	1352
A-51	1367	1364	1376
A-52	1370	1370	1376
A-53	1373	1370	1376
A-54	1374	1376	1377
A-55	1379	1370	1376
A-56	1371	1372	1376
A-59	1397	1397	1411
A-60	1399	1400	1401 (rejected)
A-61	1401	1406	1406 (rejected)
A-66	1426	1426	1426
A-67	1609	1609	1610
A-68	1609	1609	1610

Note: "R" refers to exhibits marked in the pre-trial order; All other references are to pages in the transcript.

Note: Court reporter duplicated numbering of pages 1371 to 1379 in the transcript.

No. 22121
No. 22121A

IN THE

United States Court of Appeals For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
Appellant,

v.

H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTY SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
Appellees and Cross-Appellants,

v.

HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEES AND CROSS-APPELLANTS

COUNTERSTATEMENT OF THE CASE

This statement is merely intended to supplement Appellants' Statement of the Case with corrections and additions.

During the period in question in this lawsuit there were numerous manufacturers of hot water heaters who sold their products in the State of Washington market. Each of the manufacturers had their own methods of distribution. Not all water heaters were available to each wholesaler (Tr. 391 to 393). Appellant was the principal source of supply for the appellee and cross-appellee. Appellees and cross-appellees supplemented their source of supply when other hot water heaters were available.

Competition for the sale of hot water heaters was very aggressive. The price at which the hot water heaters were sold was a principal factor in making the sale (Tr. 390, 391). The appellant Fowler Manufacturing Company's practice of establishing prices at which they offered their product to the wholesalers was to issue a price bulletin. Said price bulletins were issued on each change of price. Said price bulletins indicated the price and terms and conditions under which said product was sold (St. 954, 955).

On May 10, 1960, the appellants issued a price bulletin. On June 4, 1960, the appellants issued a price bulletin substantially raising the price of the product. On June 3, 1960, the appellant Fowler by wire to its then distributors advised of the pending price rise and indicated to its then distributors that any order placed prior to June 4, 1960 despite delivery date would be accepted at the May 10, 1960 prices (Ex. 14). During the latter part of June, 1960, the appellant and cross-appellees met to discuss the purchase and sale of appellant's product to cross-appellees. That said discussions resulted in substantial simultaneous orders being placed by the cross-appellees, Keller, Mesher, and Rosen, which orders were accepted by the appellant. In conjunction with said order, appellants authorized and issued to cross-appellees a substantial credit indicated as a promotional and advertising allowance. That said promotional and advertising allowance was granted arbitrarily without any criteria or any requirement therefor (St. 966 to 969). There was considerable dispute in the testimony as to the mechanics of said promotional allowance. However, the books and records of cross-appellee Keller indicated that promotional allowance was to off-set the pricing of the first 262 water heaters (Tr. 280, 284). The books and records of Mesher indicated promotional allowance was to off-set the price of the first 166 heaters (Ex. 3, 41-A, 41-B; Tr. 750).

That prior to July, 1960, the appellees, more particularly, Thrifty Supply Company, which is a partnership, had an exclusive franchise and distributorship agreement with the appellant. When said exclusive agreement was wrongfully terminated, a damage settlement was executed between the parties (Ex. 1).

I.

ARGUMENT IN SUPPORT OF JUDGMENT

It is admitted by appellant that the appellant Fowler Manufacturing Company is engaged in commerce, and in the course of such commerce did sell commodities of a like grade and quality to different purchasers at the same time. That the purchasers are in commerce and the commodities are sold for use in consumption or resale within the United States (Pre-trial order, admitted facts 17, 18; R. 252). Eliminating these factors from the discussion of the issues, this matter therefore is three-fold:

(1) Was There Discrimination in Price?

Finding of Fact XII reads:

> "While the Fowler Manufacturing Company issued

> price lists from time to time, established prices frequently varied from the published prices. Moreover, the plaintiffs and Fowler Manufacturing Company's co-defendants often requested the Fowler Manufacturing Company to deviate from the published price list allegedly to meet competition, and these requests were frequently granted. Often these deviations took the form of special quotes; at other times freight allowances were granted; and on other occasions special allowances in lieu of cost of delivery were made. At times the Fowler Manufacturing Company accepted protective orders and back orders—to protect the purchaser against a change in the published price list. At times Fowler would reduce prices for inventory clearances, or allow a discount for promotion of a label. The Fowler Manufacturing Company thus endeavored to meet competition to hold onto its share of the wholesale market."

That said Finding is unchallenged.

All of the testimony in this matter is such that the appellant issued periodic price lists to appellee and cross-appellees designating the prices and conditions under which the products would be offered for sale. The price offerings to appellee and cross-appellees as shown by the price lists were equal (Tr. 954, l. 19 to Tr. 955, l. 8; Tr. 1002; Tr. 1073, ll. 16-25; Tr. 1083, l. 12 to Tr. 1084, l. 10; Tr. 32, 63). All deviations from said price lists with the exception of the cash discount, the two per cent discount from December, 1961, through August, 1962, and the $1.70 freight credit from November, 1960 through February, 1961 were available to all parties.

It is true that appellees and cross-appellees availed themselves of the opportunities afforded them by the appellant in different degrees or in different quantities, but it is not denied that said opportunities were available to both appellees and cross-appellees equally.

It is admitted by appellant and cross-appellees and as is clearly indicated by the exhibits that from December, 1960 through October, 1962, the cash discount terms, both on the price sheets and on the invoices, indicate one per cent tenth proximo. It is admitted that cross-appellees were permitted to take two per cent cash discount and that appellee was permitted only a one per cent cash discount from June 1, 1961 through August, 1962. Defendants' Exhibit A-56 offered and prepared by defendant clearly shows the cash difference in accordance with the trial court's Finding of Fact XVI. There is no showing anywhere by the appellants or cross-appellees that appellees received an off-setting discount in any manner. It must be said that appellants admitted there was a discrimination in cash discounts in preparing their comparison documents (A-53, A-55 and A-66), which excluded cash discounts (Tr. 1372). Finding of Fact XIII (R. 345, 346).

Again, as to the two per cent discount allowed cross-appellee Keller and Mesher from December, 1961 through August, 1962, it is admitted by appellants that all other things being equal cross-appellee Keller received an additional two per cent discount unsupported by cost justification or other criteria (Tr. 1060 to 1073).

Further, reference to Appellant's Exhibit A-13-B which purports to be a comparison of all credits received by appellees and cross-appellees discloses that freight rates were substantially equal. Special allowance and inventory clearances were equal. Warehouse sales and credits were equal. All other credits were equal, except cash discount and the two per cent discount commencing December, 1961, and the $1.70 credits in November, 1960 through February, 1961.

Appellant attempted to off-set the two per cent special discount allowed cross-appellee Keller against the five per cent promotional allowance allowed appellees on Chevron. The testimony indicates that the five per cent promotional allowance was available to cross-appellees. In addition to the two per cent, the cross-appellee purchased Zenith at five per cent discount and still obtained a two per cent discount on all other products not labeled Zenith, and he purchased a Viking label at a $1.00 discount, which allowed the two per cent discount on all purchases including Viking (Ex. A-13-B; Tr. 1071, 1072, 1073, 1083, 1084).

(2) Was the Effect of the Discrimination Such as May Be To Substantially Lessen Competition or Tend To Create a Monopoly in Any Line of Commerce or To Enjoy, Injure, Destroy or Prevent Competition?

There is clearly no dispute that the competition for the sale of hot water heaters in the Washington market was quite aggressive. The evidence is also quite clear that the price at which the hot water heaters were sold either from the manufacturer to the wholesaler or the wholesaler to the plumber was a principal factor in making the sale (Tr. 390 to 392, 32, 240 to 241).

The trial court in its Memorandum Decision dated June 30, 1967, at page 4, stated:

> "The fact is that Fowler Manufacturing Company sold products of a like kind and quality at the same time to Keller Supply Company, Rosen and

> Mesher and to plaintiffs at different prices without justification. The purchasers were competitors in a highly competitive market where small changes of purchase price could and did affect business profits and competition."

The courts have affirmed this statement in numerous decisions. In *E. Edelman & Company v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956) it is stated:

> "We therefore turn to the record which shows substantial discrimination in price; that the purchasers of petitioner's products sold in a market where competition was keen; . . . On the basis of the above facts the Commission found what appears reasonable and obvious; that the competitive opportunities of the less favored purchasers were injured when they had to pay substantially more for the petitioner's product than their competitors had to pay."

Also, in *Sun Oil Company*, 55 F.T.C. 955, 962 (1959), it is stated:

> "It seems self-evident that where a producer is selling homogenous products, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where a margin of profit or mark-up is small, a lower price to one or some such competing retailer not only 'may' but must have the affect of substantially lessening competition."

See also, *Tri-Valley Packing Assn. v. F.T.C.*, 329 F.2d 694 (9th Cir. 1964), where the Court stated:

> "We need not decide whether, in order to show the price difference is substantial it must be established that it had some measurable impact on resale prices. For here there is adequate evidence the price discrimination had such an impact. There was testimony that those engaged in the resale of such products operated on a very narrow margin—so narrow, in fact, that it is essential to take advantage of the two percent discount for cash. The price discrim-

inations on the other hand range from two percent to ten percent.

"This would indicate that non-favored retailers, and retailers who purchase from non-favored wholesalers were required to maintain retail prices at least two percent higher than those favored retailers in order to realize any appreciable profit on retail sales. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of these merchants to compete with favored retailers."

(3) Were the Appellees Damaged by the Course of the Conduct of Appellant?

The trial court in its Memorandum Decision of June 30, 1967 at page 6 stated:

"Thrifty did not pay the same prices as Keller Supply Company, Mesher and Rosen for products of like kind and quality as those purchased at the same time by these competitors from Fowler Manufacturing Company. Because of the keenly competitive market, prices at which the products were purchased from the manufacturer significantly affected the re-sell price, the business which could be done, the profits which could be expected. The evidence establishes without a doubt, if not tacitly admitted by the defendants, that Thrifty did meet competition with the co-defendants and lost profit by meeting such prices at least to the extent of the difference in the cost of the water heaters sold by Thrifty and the cost of the water heaters sold by the co-defendants. If Thrifty had to pay higher prices for their purchases from Fowler than the prices which their competitors were paying at the same time for water heaters of like kind and quality, business and profits would surely be affected."

In *Bruce Juices v. American Can Company*, 330 U.S. 747, 67 Sup. Ct. 1021, 91 L.Ed. 1219, the Court stated:

"For despite petitioner's plaint on the difficulty

> of proving damages it would establish its rights to recover three times the discriminatory difference without proving more than the illegality of prices. If prices are illegally discriminatory, petitioner has been damaged, in absence of extraordinary circumstances, at least in the amount of the discrimination."

See also, *Elizabeth Arden Sales Corp. v. Gus Blass Company*, 150 F.2d 988; and *Bruce Juices v. American Can Company*, 187 F.2d 919.

Appellant in its brief, cites *Youngson v. Tidewater Oil Company*, 166 F. Supp. 146 (D.C. Ore. 1958), wherein the Court held that the plaintiff must show that the price discrimination actually diverted customers to the favored dealers, or forced plaintiff to lower his retail prices in order to compete.

There is no question as found by the Court and by the evidence that price was the sole indicia or one of the major factors affecting the sale of hot water heaters. Appellee met competition by lowering his prices to equal or beat those of his competition, cross-appellees. It is quite clear, therefore, since appellee was forced to reduce his prices to meet the competition he is damaged by a loss of gross profit at least to the extent of the amount he paid for the same product at the same time, in excess of that paid by the cross-appellees, his competitors.

Appellant makes much of the fact that appellee failed to produce price lists, sales invoices, or other records of its sales prices, but he ignores the fact that the testimony of the appellee is uncontroverted. In fact, that the trial court indicated cross-appellees "tacitly admitted" that he (appellee) lowered his prices to meet those of the competition (Tr. 32, 626, 687, 702).

II.

ARGUMENT IN ANSWER TO APPELLANT

I. The Word "Price" Means "Net Price" as Used in Robinson-Patman, 15 U.S.C.A. 13(a):

We have argued and pointed out in this argument that all factors of price were considered by the trial court in arriving at its conclusion. Appellant apparently ignores the fact that with the exception of the one per cent cash discount, the two per cent discount from December, 1961 through August, 1962, the $1.70 free credit from November, 1960 through February, 1961, and the drop shipment program from September, 1961 through August, 1962, that all other prices and discounts were eaually available to appellees and cross-appellees (Ex. A-13-B; Tr. 1072, commencing l. 23 through Tr. 1073, l. 25; Tr. 1083, l. 12 through Tr. 1084, l. 10).

II. Availability of a Similar Product Under the Same Terms and Conditions *Is a Defense* to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended. (Emphasis ours.)

Appellant at no time offered evidence showing that appellees bought from appellant at a disfavored price when they could have bought from any other manufacturer at favored price. The only evidence on availability offered by appellant was testimony of Mr. Gorlick (Tr. 702, l. 19 through 713, l. 20). The only evidence in this cause concerning availability is that appellee, when access to goods at lower prices were available, availed himself of this access. By so doing, he reduced the amount of damages chargeable against appellant.

Appellant by absence of evidence, failed to present a defense of availability. See *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F. Supp. 935 (D.C., N.J. 1963).

There is no evidence upon which appellant could reach its conclusion that appellees had a wide freedom of choice in water heaters at equally favorable or more favorable prices.

III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees.

Error is assigned to Finding of Fact XVI. Appellant through Mr. Joy had prepared and admitted Exhibit A-56. The purpose of said exhibit was to show the difference in cost between the one per cent cash discount allowed appellee and the two per cent cash discount allowed cross-appellees. Mr. Joy testified that said difference was not considered or included in the comparisons, A-53, A-55 and A-66. This in and of itself is an admission of discrimination in cash discounts (Tr. 1371).

Appellant also assigns error to Finding of Fact XVII. References in Finding of Fact XVII refer to the facts that support same. In addition, reference is made to (Tr. 819, ll. 1061 to 1064 and l. 1074).

Appellant devotes some ten pages of his brief to discussion of comparisons supported by exhibits which were admitted for impeachment purposes only. The same comparisons were offered as additional Findings of Fact.

The trial court had the opportunity to receive the exhibits, observe the witnesses, accept or reject from consideration the testimony and/or exhibits. The trial court in its Memorandum Decision, June 30, 1967, at page 5, stated:

> "The court further believes that in order to make several of the requested additional Findings of Fact urged by the defendants, the Court would have to rely on exhibits which were only admitted for the limited purpose of impeachment of plaintiff's evidence, and not to affirmatively prove allegations of the defendant. The court cannot find admissible evidence on which it can rely to make such additional findings."

The court further, on page 7, stated:

> "At the outset, the Court might say that it is not entirely satisfied with the record in this case, and considers that counsel has not been as helpful as they might have been in presenting a detailed and clear and cogent price comparisons. If counsel for the defendants recognized the possibility of the Court finding a violation by the defendants of Title 15, U.S.C. Section 13, and cooperated more fully with the plaintiff in the pre-trial discovery, it is probable that many of the price comparisons could have been admitted, and established by pre-trial order or established by exhibits prepared and admitted prior to trial. As it developed, the court found it necessary either to refuse or admit for limited purposes only accounting exhibits which could have substantially aided the court in reaching its decision."

See also unchallenged Finding of Fact XIII (R. 344, 345).

IV. Price Discrimination Alone in a Highly Competitive Market, Does Not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition.

V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting from the Alleged Price Discrimination.

It is submitted that both appellant's arguments IV and

V are substantially answered by appellee's argument in support of judgment.

VI. Splitting a Cause of Action Constitutes a Bar.

The trial court entered Finding of Fact XXI, which we quote:

> "Incorporated herein as a finding of fact is the order of the court on defendants' motion for summary judgment (document No. 31) stating that the only claims which are litigable in this action are those predicated on the Robinson-Patman Act, 15 U.S.C., Sec. 13, for the reason that plaintiffs' other alleged antitrust violations are res judicata by virtue of the judgment entered on December 3, 1964 (Exhibit A-9) against the cross-claims asserted by Gorlick in the state court action, *Fowler Manufacturing Company v. Gorlick*, Cause No. 599283, tried before the Superior Court for King County, State of Washington. Alleged violations of the state anti-trust statutes comparable to acts forbidden by the Sherman and Clayton Acts were decided adversely to Gorlick in the said state court action. Because the State of Washington has no legislation comparable to the Robinson-Patman Act affording Gorlick a remedy for alleged price discriminations, plaintiffs' claims with respect thereto were not disposed of in the state court action (see finding of fact No. XI entered December 3, 1964 by the state court—Exhibit A-8), and were properly brought before the federal court. On May 13, 1965 this court entered its order granting defendants' motion for summary judgment dismissing all matters in plaintiffs' claim predicated on the antitrust laws except that part of plaintiffs' claim predicated on the Robinson-Patman Act.",

to which no exception has been taken.

It is axiomatic from the law, that *res judicata*, estoppel by judgment or splitting of cause of action, can not apply where there is no cause of action.

Clearly, the Findings of Fact and Conclusions of Law of the Superior Court of the State of Washington for King County in Cause No. 599283 entitled *Fowler Manufacturing Company, a corporation, v. Harold Gorlick and Jane Doe Gorlick, his wife, et al.*, established unequivocally that appellees had no cause of action for Robinson-Patman violation in the state court. That in the State of Washington, the only remedy for price discrimination is pursuant to the Robinson-Patman Act, the jurisdiction for which is exclusively in the District Courts of the United States.

CONCLUSION

After lengthy pre-trial proceedings, the trial of this cause commenced on October 6, 1966 and continued through October 26, 1966. At the conclusion of the testimony, Judge Lindberg requested that final arguments be delayed until such time as a transcript of the reporter's notes could be prepared and counsel for each side had prepared their proposed Findings of Fact and Conclusions of Law. Final arguments were to be heard from the said proposed Findings of Fact.

Counsel complied with Judge Lindberg's request, and after filing the proposed Findings of Fact, final argument was heard on April 17 and 18, 1967. The trial court on May 19, 1967 entered its Findings of Fact and Conclusions of Law. On June 12, further argument was had on Appellant's Motion to Reconsider, Motion to Make Additional Findings and Motion to Correct Findings. On June 30, the trial court entered its Memorandum Decision and entered judgment.

From this chronology of events, it is quite apparent that the trial court took considerable pain in analyzing the numerous accounting details and numerous mathematical details in connection with this proceeding. He arrived at his decision which is supported by substantial evidence. Said judgment should be affirmed.

In connection with the affirmance of said judgment, appellee should be awarded reasonable additional attorneys' fees in connnection with the preparation of the argument of this cause pursuant to 15 U.S.C.A., 15. Counsel for appellee has expended in excess of 65 hours in analyzing the transcript and preparing its brief and said time is exclusive of the time required in connection with argument.

CROSS-APPEAL OF APPELLEES

Specification of Errors

1. The court erred in entering Finding of Fact XIV:

"Beginning in October, 1960 and continuing until after May 1, 1961, the Fowler Manufacturing Company granted to Keller Supply, Rosen and Mesher free delivery, freight allowances, and other allowances which were not granted to Thrifty until demands were made following plaintiffs' discovery of such allowances."

2. The court erred in entering Finding of Fact XV:

"On or about May 1, 1961, after learning of the various allowances granted Keller, Rosen and Mesher, the plaintiffs became delinquent in the payment of their account. The March and April accounts were in excess of $40,000.00, of which approximately $35,000.00 was for delinquent invoices for March. Gordon Copeland, a Fowler Manufacturing Company executive at said time, sought payment from Harold Gorlick. On May 8, 1961 payment was obtained, and simultaneously a debit memo (Exhibit 39) was issued. On the following day the Fowler Manufacturing Company issued its credit memo 321 for $4,639.69 (Exhibit A-1). Said credit memo was received by the plaintiffs and no objection or exception was taken to the terms set forth in credit memo 321.

"The credit memo does not detail the items for which the allowances were made. The credit memo was for a substantial amount and contains the following language:

" 'Credit memo to clear up all credits owed to Thrifty Supply Company, for defective merchandise, pricing errors, and any and all other claims.'

" 'The acceptance of this credit memo by Harold Gorlick on behalf of Thrifty Supply Company is in full and complete settlement of all claims.

$4,639.68'

"While plaintiffs claim they were never advised concerning the $1.70 credit allowed to Keller, Rosen and Mesher from November, 1960 through February, 1961, the evidence does not establish that this item, among others, was not included in the claims allowed in the credit memo of May 9, 1961.

"The court finds that the payment made and the credit memo issued under the circumstances as disclosed by the evidence in this case constituted an accord and satisfaction covering all claims of plaintiffs against Fowler resulting from or based upon cash discounts, free delivery, freight and all other special allowances granted Keller Supply, Rosen and Mesher, through May 9, 1961."

3. The court erred in entering Finding of Fact XVIII.

"In addition to the price discrimination found to have occurred against plaintiffs, as set forth in Findings XVI and XVII herein, there is evidence of other possible price discriminations occurring after May 9, 1961 and resulting from free delivery, freight allowances, and freight credits granted to one or more of the co-defendants, Keller Supply Company, Rosen and Mesher, by the defendant, Fowler Manufacturing Company (Exhibit 13-A). There is opposing evidence, however, that plaintiffs were allowed or were offered allowances or arrangements similar or comparable to those granted to the co-defendants, which allowances serve to offset any price discrimination suffered by plaintiffs (Exhibits A-53, A-55, A-66). Except for the price discriminations found to exist in said Findings XVI and XVII, buttressed as they are by the admissions of the defendants contained in the pretrial order, the evidence is not sufficient to support any further or additional finding of price discrimination against the plaintiffs by the defendant, Fowler Manufacturing Company."

ARGUMENT ON CROSS-APPEAL

I. The Court Erred in Finding That the $1.70 Credit Was Included in Credit Memo of May 9, 1961.

The trial court in Finding of Fact XIV found that the cross-appellees, Keller, Mesher and Rosen, were granted certain freight allowances from October, 1960 to May, 1961 which were not allowed cross-appellants. The court erred in the finding that said allowances were not granted to Thrifty "until demands were made following plaitiffs' discovery of such allowance."

The evidence is uncontroverted that cross-appellants did not become aware of the said allowances, and more particularly, the $1.70 allowance until the year 1963.

"Q. (By Mr. Bensussen) Did any of the Thrifty Supply Companies during the months of November and December of 1960, and January and February of 1961, receive a credit of $1.70 per water heater, per 52-gallon water heater?

"A. No.

"Q. Were you ever offered such a credit?

"A. No.

"Q. When did you first discover that such a credit had been granted?

"A. When through counsel we examined the records of the co-defendants."
(Tr. 60, l. 18 through Tr. 61, l. 4)

The records of the co-defendants (cross-appellees) were not examined until 1963 pursuant to order of the Superior Court of King County (Tr. 276, 277).

The only evidence as to what items went into the credit of $4,639.68, was the testimony of Mr. Gorlick (Tr. 577, 578). There is no evidence of any kind that the $1.70 credit allowed to Keller, Rosen and Mesher from November 1, 1960 through February, 1961 was included in that claim of $4,639.68. It could not be included because it was not known to cross-appellant Gorlick until 1963.

To constitute an accord and satisfaction, there must be a meeting of the minds of the parties upon the subject and an intention on the part of both to make such an agreement. *Meyer v. Strom*, 37 Wn.2d 818. It is axiomatic by law that in order to effect accord and satisfaction, both parties must understand the claims they are settling. In this instance, it is quite clear that cross-appellants had no knowledge concerning the $1.70 credit on May 9, 1961, and could not therefore agree to settle same.

Thrifty Supply Company was never advised concerning the allowance of $1.70 per hot water heater and never received said allowance. That during said period of time, November 1, 1960 through February, 1961, Thrifty Supply Company purchased 110 52-gallon hot water heaters at prices in excess of those sold to the cross-appellees to its damage in the amount of $867.00 (Tr. 56, l. 21; Tr. 60, ll. 18 to 25; Tr. 61; Tr. 503, ll. 1 to 9).

II. The Court Erred in Finding of Fact XVIII by Finding that Cross-Appellant Received Credits to Offset Drop Shipment from September, 1961 through August, 1962.

The evidence discloses that the cross-appellants and cross-appellees sold merchandise from their warehouse to their customers f.o.b. their warehouses. The effect of this is to place an additional charge for delivery from the wholesaler's warehouse to its customer. In September, 1961, the appellant Fowler Manufacturing Company entered an arrangement with the cross-appellees whereby they (Fowler Manufacturing Company) would deliver to cross-appellees' customers merchandise at no extra freight charge. Many of the deliveries were at points more distant from the original delivery point of Fowler Manufacturing Company than the warehouse of cross-appellee Keller, Mesher and Rosen (Tr. 541 through 545). This effectively permitted Keller, Mesher and Rosen to sell cheaper than Thrifty.

The evidence is clear that the drop shipment program was not available to cross-appellants from the fact that the existence of said program was denied by appellants when requested by cross-appellants (Tr. 430-440, 469-483, 1049-1058; Ex. 10, 33, 37 and 38).

Since the drop shipment program was not reflected on the price of the product at wholesale, it did not and could not appear in Ex. A-53, A-55 and A-66. The additional costs to cross-appellants conducting their business without the aid of the drop shipment was in the amount of $3,790.00 (Tr. 541 to 545; Tr. 929, l. 17 through Tr. 930, l. 9).

III. The Court Erred in Finding That Cross-Appellees Had Violated 15 U.S.C. Sec 13(f).

In *Automatic Canteen v. F.T.C.*, 346 U.S. 61, the Court laid down certain guide lines in determining the quantative proof necessary to prove the knowledge requisite under 13(f). It stated:

> "The trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer

> who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner with the same amount of exertion as the other buyer, can fairly be charged with notice that substantial price difference cannot be justified."

Again, in *American News Company v. F.T.C.*, 300 F. 2d 104, the Court stated:

> "The test whether a buyer has knowledge that the payments he induces and receives are illegal was laid down for cases brought under Section 2(f) by the Supreme Court in Automatic Canteen Company —although knowledge must be proved it may not be by direct evidence; circumstantial evidence permitting the inference that petitioner knew or in the exercise of normal care would have known that his proportionality of payments is sufficient."

In light of these decisions, let us examine the course of conduct of cross-appellees, Keller, Mesher and Rosen. Evidence discloses clearly that the policy of Fowler was to issue a price list to its customer, setting out prices and terms of sale. That in the latter part of June, 1960 and the early part of July, 1960, cross-appellees jointly met with the appellant to discuss an arrangement. That price lists were in existence at that time. That the original purchase was entered by the cross-appellees and was substantially simultaneously during the week of July 15, 1960. The purchase order of Keller dated 7-11-60 (July 11, 1960) included the following statement:

> "Helen—these prices will be adjusted by a credit for advertising and promotional allowance to equalize prices on the attached pink sheet (inked in 5-10-60), with the exception of the 100 gallon units which will be credited down to a price of $55.94. This credit will apply to the next 84 units ordered also."

The purchase order of July 15, 1960 from Keller Supply

Company contained the following statement:

> "Old prices rate P.O. 5 credit in the form of promotional advertising allowance to equal 5-10-60 prices will be billed at 6-4 prices, but credited to old 5-10 prices on 50-T; 6-S; 15-5; and 52-203." (Tr. 280-284)

A similar record appears in the records of cross-appellee Mesher (Ex. 3, 41-A, B and C). Finding of Fact X (R. 343).

On October 27, 1960, appellant issued Plaintiff's Exhibit 4. However, on October 21, 1960, cross-appellee Keller issued its price list (Ex. 17) offering free freight delivery as outlined in Ex. 4. Cross-appellant did not become aware of said policy of appellant until discovering Exhibit 17 in the market place (Tr. 35-44).

Commencing November, 1960 through February, 1961, cross-appellees received $1.70 credit for a 52-gallon water heater. Credit received by Keller was directed at specific purchases. On December 8, 1960, Mesher received a credit while he purchased no water heaters (Tr. 803, 804). Cross-appellee Rosen in December, 1960, received a credit of $102.00 while he purchased no water heaters (Tr. 847 and 848).

It is admitted by appellant and cross-appellees that the cash discount rate was changed in December, 1960 from two per cent to one per cent; and further admitted that all invoices issued by appellant after December, 1960 showed a cash discount rate of one per cent. Cross-appellees admit that at all times they took and were permitted to take a two per cent cash discount contrary to every published document issued by appellant.

Commencing in December, 1961, cross-appellee Keller received an additional two per cent discount. That said discount was negotiated by cross-appellee Keller contrary to the pricing policies of appellant (Tr. 357, 362).

That cross-appellee Mesher also received a two per cent discount in addition to the cash discount which he testified was a negotiated additional discount for continuous prompt payment contrary to any policies of appellant (Tr. 814 to 818).

We submit therefore that cross-appellees knew or should have known that they were receiving a discount not warranted and which was in violation of 15 U.S.C. 13(f).

CONCLUSION

In conclusion, it is submitted that judgment herein should be increased in the amount of $4,657.00 trebled pursuant to the error of court in entering its Finding of Fact XIV, XV, and XVIII.

It is further submitted that judgment should be amended to hold cross-appellee liable under 15 U.S.C. 13(f).

Respectfully submitted,

Franco, Asia, Bensussen & Coe
By Edward M. Bensussen
Attorneys for Appellees and Cross-Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief that I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with these rules.

EDWARD M. BENSUSSEN
Of Attorneys for Appellees and Cross-Appellants

No. 22121
No. 22121A

IN THE

United States Court of Appeals
For the Ninth Circuit

FOWLER MANUFACTURING COMPANY, a corporation,
Appellant,
v.
H. H. GORLICK and MORRIS GORELICK, co-partners, d/b/a THRIFTY SUPPLY COMPANY; THRIFTS SUPPLY CO. OF EVERETT, INC.; THRIFTY SUPPLY CO. OF SPOKANE, INC.; THRIFTY SUPPLY CO. OF TACOMA, INC.; and THRIFTY SUPPLY CO. OF YAKIMA, INC.,
Appellees and Cross-Appellants,
v.
HOWARD KELLER, KELLER SUPPLY COMPANY, INC., a corporation; MAX ROSEN; and NORMAN MESHER,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEES

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IN THE

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Fowler Manufacturing Company, a corporation,
Appellant,

v.

H. H. Gorlick and Morris Gorelick, co-partners, d/b/a Thrifty Supply Company; Thrifts Supply Co. of Everett, Inc.; Thrifty Supply Co. of Spokane, Inc.; Thrifty Supply Co. of Tacoma, Inc.; and Thrifty Supply Co. of Yakima, Inc.,
Appellees and Cross-Appellants,

v.

Howard Keller, Keller Supply Company, Inc., a corporation; Max Rosen; and Norman Mesher,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEES

ARGUMENT IN REPLY

I. The Word "Price" Means "Net Price" as Used in Robinson-Patman, 15 U.S.C.A. 13(a)

III. Comparison of "Net Price" Extended to Appellees and Cross-Appellees Establish That None of Cross-Appellees Were Favored Over Appellees

Appellant replies to topics I and III, together. It is fundamental, before appellees can successfully maintain a triple-damage action under Robinson-Patman in the case at bar, it is necessary to establish the prices paid to appellant were in excess of those paid by the cross-appellees, to the appellant. Without such foundation, it is palpable appellees never reach the additional requirements of (1) substantial lessening or injuring competition between the appellees and cross-appellees; and (2) injury to appellees' business or property.

The appellant, in order to demonstrate to the district court the failure on the part of the appellees to carry the burden of establishing they were discriminated against in price, presented figures comparing the "ultimate net prices" charged the appellees, as compared with the "ultimate net prices" charged the cross-appellees. This was primarily accomplished by two methods: First, a comparison of all the discounts and allowances granted to appellees and cross-appellees. Such was done through preparation and introduction in evidence of Exhibits A-13-A and A-13-B. The second was by means of Exhibits A-53 and A-55, analyzing comparative sales made to appellees and cross-appellees by appellant, where there were such comparisons available in the said period during the same month.

The accuracy of A-13-A, A-13-B, is not challenged. The volume of purchases of heater figures, presented in the appellant's brief, pages 28, 29 are not attacked. Exhibits A-13-A and A-13-B contain all discounts, cash, quantity or otherwise as well as all allowances, including the freight allowances. The only omission is the 7½% provided by Exhibit 1.

As between appellees and their largest competitor buying from the appellant, Keller Supply Company, appellees total credits, calculated on a percentage basis as to total purchases, was greater by 44/100ths of one percent. The details are shown on pages 28 and 29 of the opening brief. The percentage advantage in favor of appellees, established by Exhibits A-52 and A-13-B is not questioned in appellees' brief.

On page 36 of the opening brief it is shown as between the same two large distributors, comparing sales when made in the same month, and subjecting those comparative sales to all the adjustments, Thrifty Supply Company would have paid $1722.15 more for its heaters during the said two-year period if it had been charged the same prices as Keller Supply Company, Inc.

The only criticism aimed at the figures contained on page 36 of the opening brief is that the comparative sales figures set forth therein are taken from Exhibits A-53 and A-55, which were admitted by impeachment purposes only. The exhibits are used to refute the contentions made by the appellees. The District Court used them for the same purposes in its Finding of Fact XVIII (R. 348). The appellees never presented any kind of schedule comparing net prices.

Appellees and appellant, alike, have accepted Finding of Fact XII, printed in full on pages 38 and 39 of the opening brief. It is obvious, under circumstances established by Finding of Fact XII, there must be a comparative study of "net price" before the Court can come to a conclusion as to alleged discrimination. In presenting the case to the District Court, the appellees isolated functions of price, and stated to the Court, in effect; the cross-appellee Keller Supply Company, Inc., or one of the others, received a designated discount, allowance or credit, and appellees did not—neglecting, in each instance, to indicate allowances, credits or discounts which appellees received, and which cross-appellees did not receive. It was the burden of the appellees to produce such comparisons. It is obvious why the appellees did not, for comparisons would have shown that which was developed by appellant and presented in the opening brief, pages 28, 29 and 36.

In this connection, all invoices and all credit memos issued to appellees and cross-appellees during the entire period involved were brought into court, and were available to and used by appellees during the entire course of the trial. The appellant offered to introduce all invoices and credit memos. The Court felt such would serve no useful purpose as long as they were available for inspection by counsel (Tr. 1156, 1157).

Mr. Robert Garthwaite, employed by the appellees in preparation for the state court case, through court order went into each cross-appellees' place of business and digested every invoice and credit memo issued by the appellant to the cross-appellees, and checked them against vouchers. Appellees had all the information necessary to make a comparative sales study (Tr. 284, 328, 329). Mr. Garthwaite stated:

"Q. All right

"A. I got very fine cooperation.

"Q. From all three?

"A. From all three parties.

"Q. And from Mr. Sinsheimer also?

"A. Very well." (Tr. 329)

Offsetting and equalizing credits:

The appellees, at pages 5 and 6 of their brief, state:

> "Further, reference to appellant's Exhibit A-13-B, which purports to be a comparison of all credits received by appellees and cross-appellees discloses that freight rates were substantially equal. Special allowances and inventory clearances were equal. Warehouse sales and credits were equal. All other credits were equal *except cash discount and the two percent discount commencing December, 1961* and the $1.70 credits in November, 1960 through February, 1961." (Emphasis ours).

The foregoing statement does not harmonize with the analysis of figures set forth in the opening brief at pages 28, 29 and 36.

There are a number of areas where credits are unequal and favor the appellees. These are demonstrated by exhibits hereinafter referred to. Some of the credits favoring the appellees are as follows:

Ex. A-1: Credit memo 321 for $4639.68

Ex. A-20: Ten credit memos which reflect 5 discount on "Chevrons", granted to appellees prior to September 1, 1962, when Keller Supply Company, Inc. first was granted 5% on "Zenith" uprights.

Ex. A-21: Part of which consists of 9 credit memos granting 5% on "Chevrons", 3% and 2% discounts on "Fowlers," granted before September 1, 1962.

***Credit Memo* 321:**

Simultaneously with the payment of a delinquent account, the appellant granted a singularly large credit for $4639.68 to the appellees.

When Mr. Stevens, Gordon Copeland's superior, heard of this, he was angry (Tr. 577). Harold Gorlick had promised, when the agreement of September 9, 1960 was signed, that appellees would pay their accounts on time. The very terms of the agreement so provided (Ex. 1). Harold Gorlick took a plane to Los Angeles (Tr. 577), presumably at the request of Mr. Milton Stevens. While there he wrote a letter (Ex. A-24), dictated by Mr. Stevens, dated May 19, 1961 (Tr. 573, 574). Mr. Gorlick testified:

"Q. . . . Now, did you, on or about December seventh of 1960 receive a notice that the Fowler Manufacturing Company was changing its terms to one percent?

"A. Yes, I did.

"Q. And did you, after you received that notice, continue to take two percent nevertheless?

"A. Only after I was allowed to do so.

"Q. And you took two per cent up until May 9, 1961, is that true?

"A. Yes." (Tr. 563)

The letter (Ex. A-24), provides in part:

> ". . . We understand that the discount terms are one per cent tenth prox., or net thirty days from the date of invoice, and agree to abide by same."

An indication of the circumstances under which the foregoing was written may be gleaned from the following cross-examination:

"Q. And you did that without any reason or without any basis with a man you were doing a good deal of business with, is that it?

"A. You want to know the situation that led to that meeting or why that meeting came about? Is that what I understand?

"Q. All right, if you wish to explain it that way, go ahead.

"A. Mr. Stevens had called me prior to that meeting and said that he had just seen the credit of this forty-six hundred dollars and some odd cents and that he was put out on seeing credits, large credits, being issued to Thrifty Supply Company and that this had to stop. He didn't want to see any more in the future. . . ." (Tr. 576, 577).

We agree with the Court, and urged upon the Court, Exhibit A-1, credit memo 321 for $4639.68 was an accord and satisfaction. This did not prevent the item from being used to show what the appellees received and what the cross-appellees received in the way of credits. Such determines the effect on competitive processes—not the name given to the items nor the terminology used.

When there are offsetting credits extended to competitor distributors, they cannot injure a competitor in his business or property.

Exhibits A-20 and A-21:

Keller Supply Company was allowed a two percent trade discount across the board on all of its purchases, excepting "Zenith" uprights (R. 347, 348; Finding XVII), commencing on or about December, 1961. The Court found the appellees, during said period, purchased water heaters for which appellees paid $251,307.83, multiplied the same by 2% totaling $5,026.16, and allowed the said sum as an item of damage.

During the period from February, 1962 to September, 1962, appellees were receiving 5% on "Chevrons" and sometimes 3%, and sometimes 2% on "Fowlers." We refer to September, 1962, as that is when Keller Supply Company, Inc. received its first 5% discount on its private label "Zenith" (Ex. 13-A). The other cross-appellees did not have any private labels.

Thus, during the period from February, 1961 to September, 1961, while Keller Supply Company, Inc. was receiving 2% across-the-board trade discount, the appellees were receiving these discounts of 5% on "Chevrons" and 3% and 2% on "Fowlers," which were offsetting.

In exhibit A-20, ten of the credit memos of the exhibit refer to invoices dated prior to September 1, 1962, and cover 5% discount on "Chevrons," totalling a credit of $2428.97.

In exhibit A-21, nine of the 17 credit memos refer to invoices issued prior to September 1, 1962, and cover 5% discount on "Chevrons," as well as varying discounts of 3% and 2% on "Fowlers," for a total credit of $602.63.

To offset discounts allowed appellees on "Chevrons" and "Fowlers" during the period from February, 1962 to September, 1962, appellees call attention on page 6 of their brief to a purchase of "Vikings" made by the Keller Supply Company, Inc. It appears this private label was not taken over by anyone. At any rate, the entire number of "Vikings" purchased by the Keller Supply Company, Inc. was 135, with a discount of one dollar on each, totaling $135.00 (Ex. 13-A)—a de minimis figure when pitted against the 5% discount figures on "Chevrons" sold to appellees between the months commencing with February, 1962 and September 1, 1962, when Keller Supply Company, Inc. had no private brand.

In addition even as to base price, Keller Supply Company was often charged more than appellees for heaters that it purchased from appellant. As an example, we have prepared a schedule—Appendix A—showing a number, but not all of the times where the base price charged Keller Supply Company was in excess of the base price charged appellees. On this schedule is not shown the many purchases where they were both charged the same base price nor the times when appellees were charged higher base prices than Keller Supply Company for the same model heaters. The schedule compares some of the base prices contained in Exhibits A-30 and A-57, A-57-A, A-57-C, A-57-D.

Not one of the exhibits used for comparative figures, exhibits A-53, A-55, A-66, A-13-B, A-20, A-21 take into account in any manner exhibit 1.

II. Availability of a Similar Product Under the Same Terms and Conditions is a Defense to an Alleged Violation of Section 2(a) of the Clayton Act, as Amended

Under this heading the appellees state the following, and nothing more:

> "Appellant at no time offered evidence showing that appellees bought from appellant at a disfavored price when they could have bought from any other manufacturer at favored price. The only evidence on availability offered by appellant was testimony of Mr. Gorlick (Tr. 702, l.19 through 713, l.20). The only evidence in this cause concerning availability

is that appellee, when access to goods at lower prices were available, availed himself of this access. By so doing, he reduced the amount of damages chargeable against appellant.

"Appellant by absence of evidence, failed to present a defense of availability. See *Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F. Supp. 935 (D.C., N.J. 1963).

"There is no evidence upon which appellant could reach its conclusion that appellees had a wide freedom of choice in water heaters at equally favorable or more favorable prices." (Appellees' Br., pp. 10,11)

In testifying as to the various electric water heaters sold by the appellees from about the inception of their business, Harold Gorlick stated that in 1952 they handled "Abco" water heaters, made by Appliance Building Company (Tr. 6). In 1953 and 1954 they were distributing the "Rheem" water heater (Tr. 6). Then they sold "Northern," manufactured by the Northern House Company, in which company he had an interest (Tr. 7) and then they had General Electric water heaters in 1956 (Tr. 7). In 1957 and 1958 it was "Hot Point" (Tr. 7).

Mr. Howard Keller was called as an adverse witness by counsel for appellees. He testified, in part:

"THE COURT: What about the—

"THE WITNESS: (interposing) Manufacturer?

"THE COURT: (continuing)—the competitive situation from the manufacturer to the distributor?

"THE WITNESS: Right, that is very competitive because there are many manufacturers who are trying to get their share of the market, and naturally they compete very strenuously." (Tr. 392)

Mr. Gorlick testified he always purchased from "Abco" as well as purchasing at times from others than appellant, during the period involved:

"Q. Who were you ordering from in the latter part of 1962?

"A. Mission Water Heater Company.

"Q. Anybody else?

"A. Well, all right, yes, we were buying some from Abco. We always bought from Abco." (Tr. 707).

Again, he testified:

"Q. Now did you ever handle White water heaters during the period 1960 to 1962?

"A. Yes.

"Q. And have you got your invoices on Whites?

"A. I don't have them with me.

"Q. You have them available, do you?

"A. Let me think. I should have them. Yes, I believe I have.

"Q. Were those prices less or more on 52's?

"A. They were less and I believe I even bought from White water heaters at this $35.50 price on a fifty-two gallon." (Tr. 713).

The foregoing price was much less than those granted to cross-appellees (Ex. A-53, A-55, A-66). Mr. Fred Fowler, former president of appellant, who had terminated his connection with appellant in August, 1961 (Tr. 917, 918) stated the complaints he received from the appellees were not directed to prices appellant was granting to others, but rather as to the prices that were being offered on water heaters manufactured by others:

"Q. Now, the question, however, was directed at Thrifty Supply through Harold Gorlick. What were his complaints?

Were his complaints against manufacturers of products, distributors of manufacturers of products other than Fowler Supply, or were they directed against distributors of Fowler Supply heaters?

Have I made myself clear on that?

"A. I understand your question.

In the water heater industry, because of a particular distributor buying from a particular manufacturer, it does not preclude the fact that the representatives of other manufacturers will from time to time call on that distributor and offer to him or it a program of endeavoring to sell products to that distributor and generally the inducement was price and, if such a procedure took place, we were immediately called and told, "Your price is too high. I have been offered water heaters at such and such a price, which is lower than yours." And, in general, these were the complaints of price competition and pricing, as I recall the complaints.

"Q. Were they made by Harold Gorlick?

"A. Yes.

"Q. And do you remember what particular corporation's products he complained about?

"A. Well, the various ones that I have mentioned, Pioneer, Mission, White and possibly Rheems and General. There may have been others." (Tr. 951, l. 18 through 952, l. 20)

As soon as the $37,500 credit was fully satisfied, as provided by exhibit 1, the appellees purchased elsewhere. They discontinued purchasing from appellant altogether at the end of October, 1962. If the appellees had any worry about a source of supply, it is quite certain they would not have failed to pay for the water heaters they received. They never paid for one heater, ordered after August 21, 1962, until judgment was entered against them more than two years later, on December 3, 1964 (Ex. A-9).

Before appellees discontinued taking delivery on electric heaters, they commenced buying from the manufacturers of Mission heaters, at a cheaper price. Requests for admissions 44 and 45, read into the record, were as follows:

> "And number 44 on page eight.
>
> " 'Do you admit the ultimate net price, per unit, to you on fifty-two gallon glass-lined water heaters from Mission Corporation during the month of October, 1962, was less than the ultimate net price from Fowler Manufacturing during said month?
>
> " 'Plaintiffs admit same.' " (Tr. 1562)
>
> "Number 45:
>
> " 'Do you admit the ultimate net price, per unit, to you on sixty-six gallon glass-lined water heaters from Mission Corporation during the month of October, 1962, was less than the ultimate net price from Fowler Manufacturing during said month?'
>
> " 'Plaintiffs admit same.' " (Tr. 1562)

On or about January, 1962, appellees bought "General" 52's, at \$35.50 (Tr. 712, 713), when the cross-appellees were purchasing the same type heater from appellant for a bare price of \$41.90 (Ex. A-29, A-30, A-31). Also during the two-year period the appellees were purchasing "White 52's" for \$35.50 (Tr. 713).

The evidence is overwhelming that the appellees had a wide freedom of choice at prices as favorable or more favorable than offered by the appellant to any of the cross-appellees.

IV. Price Discrimination Alone in a Highly Competitive Market Does not Satisfy the Requirement of Robinson-Patman to Establish Effect of Substantially Lessening or Injuring Competition

The appellees came into Court with the thought of establishing a difference in a function of price. If that was all that is required under Robinson-Patman, each party in this type of business would be suing the other continuously. Harold Gorlick characterized the business as a "day-to-day business" (Tr. 702). To us, this means prices were changing frequently. The only practical approach to this type of trading market is as suggested by Commissioner Phillip Elman, quoted in the Washington Law Review and set forth on page 39 of the opening brief. Commissioner Elman advances the proposition where there are price differences which are temporary or sporadic, or where they tend to cancel each other out, such as not likely to produce any harmful effects upon the competitive processes.

The Court found:

> "The electric water heater generally is simple in design, and quite uniform in manufacture. There was little choice between the electric water heaters manufactured by the various companies distributing in the territory served by the plaintiffs and by Keller Supply Company, Mesher Supply Company, and Rosen Supply Company. . . ." (Finding of Fact VII, R. 340)

The foregoing meets the requirements of alternative products as used in *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 356, 18 L.Ed. 1249, 87 S.Ct. 1856 (1967).

Each of the cross-appellees and the appellees sold other water heaters during the period involved. Exhibit A-4 is a good example.

Whenever prices are compared in the evidence, the appellant's prices are higher. The written exhibits, A-3, A-4, A-5 and A-6 all written by Harold Gorlick, refer to other manufacturers selling at lower prices than the appellant.

Mr. Nickoloff and Mr. Fowler were being informed constantly by Mr. Gorlick that Fowler Manufacturing Company was being undersold in the market place (Tr. 1045, 951 ll. 18 to 952, l. 21). Fowler was trying to be competitive with other manufacturers and at the same time survive. It is difficult to demonstrate anything in the evidence the appellant did that would have had the effect in this market of lessening or injurying competition.

V. Appellees Never Demonstrated Any Actual Damages to Their Business or Property Resulting From the Alleged Price Discrimination

We quote from the appellees' brief, at page 9:

> "Appellee met competition by lowering his prices to equal or beat those of his competition, cross-appellees."

There is no evidence in the whole record that any of the cross-appellees dropped their prices on heaters sold to them by appellant at any time during the period involved. It would be most remarkable, if because the appellant changed appellees cash discount rate for a period of time from 2% to 1%, any of the cross-appellees lowered the price on heaters sold to them by Fowler. Secondly, there is no evidence that when Keller or Mesher were receiving 2% across the board, at or about the same time appellees were receiving 5% on "Chevrons" and sometimes 3% and sometimes 2% trade discounts on "Fowlers"; that any of the cross-appellees dropped their prices.

Wherever there is any evidence about prices offered by the appellees to the trade, invariably it leads to the conclusion appellees were at all times underselling the cross-appellees on water heaters manufactured or distributed by appellants, and consequently there was never any occasion for appellees to drop their prices to meet the competition of cross-appellees.

In November, 1960, according to Mr. Gorlick's own testimony, the cross-appellees were claiming they could not meet the prices being offered by appellees on heaters manufactured by appellant:

> "A. They didn't complain to me directly, the factory complained that there were chaotic prices in the three-county area, and we were an instigator or the cause of it, and called a meeting in November of 1960 to discuss that situation. Actually part of this letter of October 27th outlines a policy that refers to this matter when they talked about ghost competition." (Tr. 52, 53).

Mr. Fowler testified to an incident that occurred at the meeting:

> "We sat down around the table and started to discuss the various matters for which the meeting had been called. During the course of the meeting we did discuss competition, price-wise, in general. We discussed the pricing of water heaters as offered by the various distributors to the dealer organization in the Seattle-Tacoma trading area or market.
>
> "During the period of this discussion it was pointed out, I don't recall by whom but it was pointed out by one or two of the co-defendants, that it seemeed

> Thrifty Supply Company had offered water heaters at a very low figure and it was wondered why or how this particular distributor could operate with such a low margin of profit." (Tr. 939, 940).

Harold Gorlick testified in the spring of 1962 other distributors were complaining to appellant about the prices quoted on "Chevron" 52's, at $41.95, by appellees (Tr. 630). He also testified he informed the appellant the reason he was quoting $41.95 was to meet the prices cross-appellees were quoting on "General" water heaters, *not* the appellant's heaters. Keller Supply Company, Inc. and Rosen were purchasing "General" water heaters at prices less than the Fowler Manufacturing Company was selling its water heaters (Tr. 1565, 1568, 1569).

Obviously, cross-appellees could not sell Republic's, the exact duplicate of "Chevrons" except for color trim, for $41.95 and pay a base price of $41.90 (Ex. A-29, A-30, A-31), even if Mr. Keller and Mr. Mesher did receive 2% cash and 2% trade discount.

William Butterbaugh, who worked for the appellees as a salesman until January 1, 1961, stated that he was given exhibit A-59 to show to his customers, which grants a 6% discount for cash. The document was used by him until he resigned (Tr. 1410). The cross-appellees allowed 2% discount for cash—a custom of the trade (Tr. 821).

Appellees never produced one invoice, or price list, or called one salesman as a witness. We believe it is a fair inference such would have established that the appellees were selling at prices which could not be met by cross-appellees. If the appellees had a desire to do so, and apparently they did, they could use the means provided by exhibit 1, and the 5% on "Chevrons" to create a market advantage for themselves. Very soon after that advantage was eliminated by Keller Supply Company, Inc. receiving 5% discount on its own private brand, on or about September 1, 1962, and the termination of the 7½% provided by exhibit 1, the appellees took their business elsewhere, although they stated in open Court they were claiming no discrimination after August 21, 1962 (Tr. 1121).

Appellees, to meet the criteria promulgated by *Enterprise Industries v. Texas Co.*, 240 F.2d 457, assert in their brief they lowered prices to meet competition of cross-appellees. As support for their contention, on page 9 of the appellees' brief they make reference to transcript 32, 626, 687 and 702.

In reviewing the appellees references, transcript 32 has reference to exhibit 2, a price list issued by Keller Supply Company, Inc. on July 20, 1960, three months beyond the statute of limitations, and almost two months before the appellees obtained the letter agreement of September 9, 1960.

The next reference, 626, contains appellees' statement they are meeting the prices for which cross-appellees are selling "General" water heaters made by the General Water Heater Company. There is nothing in said reference as to any prices cross-appellees were quoting on electric water heaters manufactured or distributed by appellant. The reference is not germane. Exhibit A-4 is reprinted herewith:

[Thrifty Supply Company Letterhead, dated 4/9/62]

"Gordon:

"Here are General's Price as being quoted by

	Rosen	*Mesher*	*Keller*
42 Upright			41.10
52 "	42.50	42.50	42.54
66 "	56.75	54.97	54.54
82 "	75.00	74.80	73.20
50 TU	45.50	44.15	
50 T		67.09	

"These are subject to 2% Cash Discount so $42.50 less .85 cents (2% Cash Discount) is $41.65 . . . that's why we don't move any water heaters at $41.95 net.

"Gordon I went out and verified the market today. That is the pricing in this market today and has been since they acquired General.

"I'll sum up by telling you we will meet competition.

s / HAROLD"

Reference 687 refers to drop shipments on lots of 20 or more. Said reference does not indicate cross-appellees lowered their prices or that the appellees reduced their prices.

The next reference is to page 702. This has to do with competition characterized as "fierce" by the appellees, and a statement that the water heater business is a day-to-day business. There is no statement that cross-appellees lowered their prices, or that the appellees reduced their prices, to meet competition of cross-appellees.

Whenever there is any evidence in the record as to any prices quoted by appellees on the appellant's heaters, they invariably indicate the prices were lower than any offered by the cross-appellees. In no instance, for the two-year period involved, did the appellees establish that any of the cross-appellees lowered their prices, and in no instance did the appellees prove in any manner they lowered their prices on water heaters manufactured or distributed by the appellant to meet the prices quoted by any of the cross-appellees on heaters manufactured or distributed by appellant. The criteria required to meet *Enterprise v. Texas Co.*, 240 F.2d 457 (2nd Cir., 1957), are wholly lacking.

VI. Splitting a Cause of Action Constitutes a Bar

Appellees' only response to appellant's contention that appellees split their cause of action, is to state appellees had no cause of action in the state court.

In appellees' pleadings in the state court action (Ex. A-7), appellees alleged a cause of action arising out of the same transactions between the parties that are the subject matter of the instant lawsuit. The said cause of action was based upon alleged violations of R.C.W. 19.86 and R.C.W. 19.90, which include legislation comparable to 15 U.S.C.A. §§ 1, 2, footnotes pp. 12 and 13 of the opening brief. The state court's Findings of Fact (Ex. A-8, pp. 6, 7) affirmatively establish that appellees' cause of action, insofar as the state law paralleled 15 U.S.C.A. §§1, 2, was determined adversely to appellees on the merits. The trial court recognized this position in granting partial summary judgment to appellant (R. 74, 349), stating that alleged violations of the state anti-trust statutes comparable to acts forbidden by the Sherman and Clayton Acts were decided adversely to appellees in the state court action. The question to be determined is whether the fact the first forum offers less relief than the second forum under the same set of facts, should bar a litigant. Appellant contends that the authorities cited in appellant's opening brief (to which appellees failed to respond) establishes that under these facts a second lawsuit should not be permitted.

The state law R.C.W. 19.86.090 allows treble damages for recovery under either R.C.W. 19.86.030 or 19.86.040.

Assuming the appellees in their state court case had been successful and obtained recovery under R.C.W. 19.86.030 or R.C.W. 19.86.040 which two statutes are comparable to 15 U.S.C.A. §§1, 2, the District Court, in our opinion, would not have permitted the appellees to pursue the case at bar.

There is no legal distinction to our knowledge insofar as a bar is predicated on splitting a cause of action, between success and failure in the first forum.

ARGUMENT IN ANSWER TO APPELLEES ON CROSS-APPEAL

I. The Court Erred in Finding the $1.70 Credit Was Included in Credit Memo of May 9, 1961

In late 1960, the manufacturers of "National", "Abco" and "Northern" water heaters were offering to deliver in the vicinity of Seattle directly to the customer in 6-pack, or more, without charge to the distributor (Tr. 929). To offset the cost to the distributor of delivering in 6-pack, the distributor was allowed, for a short period of time, $1.70 per heater (Tr. 929, 930).

The appellees, unlike the cross-appellees, had their own trucks, and chose to deliver with their own equipment and take a credit for what the auto freight would charge for delivery (Tr. 932, 933) instead of accepting the $1.70 per heater.

As compensating credits for the $1.70 allowed per heater, the appellees were allowed $496.29 to cover the equivalent of freight bills that would have been charged for delivery of those heaters which were qualified under the 6-pack program. This allowance was covered by the issuance of four credit memos, 2048, 2049, 2050, 2051 (Tr. 933; Ex. A-13-A; Ex. A-14).

The appellees admitted the foregoing, but only complained because the program was not extended to Everett in Snohomish County:

> "Thrifty Supply Company of Everett would be excluded from this." (Tr. 44)

The competition of free delivery was not in Everett, so the appellant felt there was no necessity to extend it to that city. Besides, all heaters purchased by the appellees were purchased through their Seattle offices (Finding of Fact I; R. 338). The appellees purchased their Everett requirements on 6-pack, through the Seattle office (Tr. 52). To meet the complaint made by appellees that they should be further compensated to meet the difference in freight rate between Portland, the shipping point of appellant, and Seattle, and between Portland and Everett, the appellees were granted an extra .51 cents per hundred pounds (Tr. 604, 605; Ex. A-14; Credit Memo 1784; Ex. A-13-A). The appellees presented the equivalent of freight on 6-packs; and, it was paid (Ex. A-13-A; Tr. 932, 933).

The 6-pack free-delivery lasted but a short time (Tr.

605, 606, 930). The amount granted to each of the four parties as credits, under the said program was as follows:

Mesher	$ 153.00	(Tr. 931)
Rosen	$ 170.00	(Tr. 931)
Keller Supply Company, Inc.	$ 455.60	(Tr. 932)
Thrifty Supply Co.	$ 496.29	(Tr. 933)

In addition, Thrifty received credit memo 1784, as reflected in exhibit A-14, in the sum of $109.99 to cover the .51 cent freight difference to Everett, Washington.

II. The Court Erred in Finding of Fact XVIII by Finding That Cross-Appellees Received Credits to Offset Drop Shipment From September, 1961 Through August, 1962.

The appellant's sales manager, William Nickoloff, was gratified the appellant was on the eve of acquiring large 40-foot vans (Tr. 1034). The appellant was about to inaugurate a drop-shipment plan, whereby the appellant in lots of twenty or more would drop-ship to the door of the customer of the distributor, without any additional charge (Tr. 1039). Mr. Nickoloff called on the appellees' Harold Gorlick, who at first thought it was a good idea (Tr. 1034). When it was inaugurated, and the appellees did not seem to be using it, he inquired why such was the case, and was informed the appellees did not want the appellant to know who were appellees' customers (Tr. 1035), and were therefore not in favor of the program (Tr. 1035, 1036). Harold Gorlick testified at one point that he was not interested because he did not want the factory to know the names of his customers (Tr. 691). Then, he immediately thereafter testified he did want the program (Tr. 692). He wrote in a letter dated December 6, 1961:

> ". . . Your programs of drop-off shipments to customers we told you we were not interested in because we didn't want you or anyone else to know who our customers were; is true, but it was just one reason we were not interested in this program. . ." (Ex. 37)

The appellees actually did take advantage of the drop-shipment, on occasion; to Rome Supply (Ex. A-39; Tr. 694, 695) and to Pease & Sons of Tacoma (Ex. A-38; Tr. 693). Harold Gorlick admitted he may have used the drop-shipment program occasionally (Tr. 728).

As far as the record is concerned, the appellees may not have had any other customers who were purchasing in lots of 20 or more water heaters. If they had any besides Rome Supply Company and Pease & Sons, who were purchasing in lots of twenty, or more, appellees have never disclosed who they were, even at the trial of this cause.

Appellees' position is they are entitled to damages calculated on the drop-shipments Keller Supply Company, Inc. made, irrespective of whether appellees had any orders of twenty, or more, that could qualify under the drop-shipment plan, or whether they wanted to take advantage of the program (Tr. 541-545). It is certain the program could not operate without the distributors informing the appellant the places where to deliver the heaters.

> "THE COURT: But you didn't want the drop shipment program.
>
> "THE WITNESS: Yes, we did. As I say—
>
> "THE COURT: (Interposing) Maybe this is in another period. I had in mind those letters." (Tr. 546)

III. The Court Erred in Finding that Cross-Appellees had not *(sic)* Violated 15 U.S.C.A. §13(f)

Appellees admit that the guidelines in determining the quantum of proof necessary to hold a buyer under 15 U.S.C.A. §13(f) are found in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953). In the case cited the Court held, in part, that the commission had the duty of showing the buyer, Automatic Canteen, not only had knowledge of the differential, but also had knowledge that there was no cost justification for the price, as well as other defenses under Section 2(a). In other words, in such case it is incumbent upon the plaintiff to establish, affirmatively:

(1) That the buyer knowingly induced or received a price discrimination of the nature sufficient to establish a prima facie case against a seller under 2(a);

(2) That the buyer knew that he was receiving a discriminatory price;

(3) That he knew the price disparity was not cost-justified or justified under any of the defenses available under 2(a); and,

(4) The burden is upon the plaintiff to establish these facts by a preponderance of the evidence.

None of these elements are present in the instant case.

All of the transcript references used by the appellees to bolster their argument stand only for the proposition that cross-appellees were allegedly receiving something not granted to appellees—not that cross-appellees had any knowledge that appellees were not receiving them.

For example, appellees state that cross-appellees took

2% discount, contrary to the published price position of 1%, from December, 1960, on. Appellees evidently forget that from December, 1960 through May, 1961 they too were taking 2%, and that after August 21, 1962 appellees again took 2%. We fail to see how a deviation from a published price in December, 1960 gives knowledge that a competitor is not allowed this deviation in May, 1961.

Also appellees refer to a 2% trade discount Keller Supply Company, Inc. negotiated in December, 1961, which appellees state was contrary to the pricing policies of appellant. Appellees neglect to mention that during this same period of time they received 5% on "Chevron" water heaters sometimes 3%, and other times 2% on "Fowlers," (Exs. A-20, A-21, A-13-A). In view of this, it is difficult to see why Keller Supply Company, Inc. should think they were getting preferential treatment.

Appellees also spend several paragraphs detailing transactions that took place prior to October 28, 1960, which is beyond the statute of limitations and wholly immaterial.

Appellees advert to the short period of time when cross-appellees received $1.70 per heater under the 6-pack program to meet a competitive situation. At that time, as is previously shown, appellees preferred delivering by their own trucks, and receiving a discount equal to the cost of freight.

Appellees urged this was a day-to-day market. All parties agreed competition was keen. Appellees cannot seriously state that deviation from a published price gives knowledge one is buying at prices less than his competitors, when he himself urged and was the recipient of many such deviations.

The cross-appellees did not know the discounts and allowances which were granted to appellees. How could they know? Certainly the appellees did not tell them. It is very unlikely the personnel of the appellant would inform them. The cross-appellees testified they had no knowledge of the special credits that were allowed to the appellees (Tr. 451, 452, 453, 835, 854).

The cases cited by appellees under 15 U.S.C.A. §13 (f) are so far removed on their facts they have no applicability to the case at bar.

Appellees cited *America News Co. v. Federal Trade Commission*, 300 F.2d 104, in support of their position. The petitioner was a predominant factor in the distribution of magazines. There were two methods of distribution to the public: one, by subscription; the other, through news stands. The petitioner controlled 930 of these outlets. Its closest competitor, A.B.C. Vending Corporation, controlled only 57. Petitioner created a demand for rebates, otherwise indicating to the publishers it would either not distribute the publication, or would make arrangements to not display the recalcitrant publisher's publication—which would seriously hamper the publisher's distribution.

So lucrative was the plan for rebates that out of a gross business of $5,280,000 annually, in the sale of magazines, the petitioner received $890,000.00, in rebates. So potent was the petitioner's position, one of the publishers wrote:

> "I assume if the new rate is unacceptable to us our magazine would not be distributed on your out-

> lets. In view of this situation we have no recourse but to say yes."

The facts of the *America News Co.* case, *supra,* are so gross and culpable as to leave little room for doubt. The instant case, as previously indicated, is not comparable.

In *Automatic Canteen Co. v. FTC,* 346 U.S. 61 (1953) the defendant had extremely potent buying power, and extracted prices as much as 33⅓% better than prices tendered to other buyers. In spite of this, the Court found no violation.

CONCLUSION

Reference to all exhibits and all competent evidence bearing upon the issue of net price comparisons establishes the appellees were the favored buyers.

The overwhelming evidence is that water heaters manufactured by others were always available to appellees, at prices as favorable, if not more favorable, than those granted to cross-appellees by appellant.

The long record in this cause amply establishes the appellees did not sustain any damages by reason of any alleged misconduct or alleged discrimination on the part of the appellant.

Temporary and shifting price differences are almost impossible to avoid in the type of market described by the witnesses, if the normal free market processes are permitted to operate. This type of deviation cannot be harmful unless there be a controlled market by a dominating or cooperative dominating force—a condition not evident in the slightest degree in this case.

The appellees pursued their alleged cause of action in the state court by interposing the same as a permissive counter-claim. The state court made a determination on the merits, adverse to the appellees. Prosecution of the case at bar constitutes splitting a cause of action.

The judgment below should be reversed, and the cause against the appellant dismissed, and the judgment dismissing the cross-appellees affirmed.

Respectfully submitted,

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Attorneys for Appellant and Cross-Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. M. Koenigsberg,
Of Attorneys for Appellant and Cross-Appellees

APPENDIX A

Invoice date:	Model:	Number of units purchased:	Base unit price Thrifty:	Base unit price Keller:	Exhibit reference:
Feb. 7, 1961	66-505	6	$56.69		A-57D
Feb. 14, 1961	66-505	16		$65.47	A-30
Feb. 20, 1961	66-505	12		65.47	A-30
Feb. 14, 1961	52-505	16		51.08	A-30
Feb. 24, 1961	52-505	12	46.45		A-57D
Mar. 3, 1961	52-505	12		51.08	A-30
Mar. 30, 1961	52-505	75	46.45		A-57D
Mar. 31, 1961	52-505	75	46.45		A-57D
Oct. 10, 1961	66-109	12		54.53	A-30
Oct. 25, 1961	66-109	2	46.36		A-57
Oct. 27, 1961	66-109	12	46.36		A-57D
Oct. 23, 1961	50-TU-203	24	38.11		A-57D
Oct. 24, 1961	50-TU-203	12	38.11		A-57D
Oct. 31, 1961	50-TU-203	12		42.30	A-30
Oct. 17, 1961	66-203	1	46.36		A-57C
Oct. 17, 1961	66-203	6		51.10	A-30
Oct. 23, 1961	66-203	36	46.36		A-57D
Oct. 24, 1961	66-203	28	46.36		A-57C
Oct. 27, 1961	66-203	12		51.10	A-30
Oct. 31, 1961	66-203	12		51.10	A-30
Nov. 13, 1961	50-TU-203	6	38.11		A-57D
Nov. 14, 1961	50-TU-203	2	38.11		A-57
Nov. 15, 1961	50-TU-203	12	38.11		A-57D
Nov. 20, 1961	50-TU-203	6	38.11		A-57C
Nov. 21, 1961	50-TU-203	10		42.30	A-30
Nov. 27, 1961	50-TU-203	12	38.11		A-57D
Nov. 30, 1961	50-TU-203	20		42.30	A-30
Nov. 9, 1961	66-203	34		51.10	A-30
Nov. 13, 1961	66-203	12	46.36		A-57C
Nov. 13, 1961	66-203	3	46.36		A-57D
Nov. 15, 1961	66-203	24	46.36		A-57D

Invoice date:	Model:	Number of units purchased:	Base unit price Thrifty:	Base unit price Keller:	Exhibit reference:
Nov. 16, 1961	66-203	42		51.10	A-30
Nov. 20, 1961	66-203	12	46.36		A-57C
Nov. 20, 1961	66-203	12	46.36		A-57D
Nov. 21, 1961	66-203	10		51.10	A-30
Nov. 24, 1961	66-203	30		51.10	A-30
Nov. 27, 1961	66-203	12	46.36		A-57D
Nov. 13, 1961	40-TU-203	6	36.04		A-57C
Nov. 14, 1961	40-TU-203	2	36.04		A-57
Nov. 20, 1961	40-TU-203	6	36.04		A-57C
Nov. 21, 1961	40-TU-203	10		$40.10	A-30
Nov. 24, 1961	40-TU-203	15		40.10	A-30
Nov. 30, 1961	40-TU-203	5		40.10	A-30
Dec. 7, 1961	66-203	35	46.36		A-57D
Dec. 14, 1961	66-203	8		51.10	A-30
Dec. 29, 1961	66-203	12	46.36		A-57C
July 19, 1962	52-203	75	40.90		A-57D
July 23, 1962	52-203	84	40.90		A-57C
July 23, 1962	52-203	36		41.90	A-30
July 24, 1962	52-203	14		41.90	A-30
July 26, 1962	52-203	5	40.90		A-57C
July 26, 1962	52-203	36	40.90		A-57D
July 31, 1962	52-203	24		41.90	A-30
July 16, 1962	52-109	68	40.90		A-57D
July 19, 1962	52-109	10	40.90		A-57A
July 20, 1962	52-109	90	40.90		A-57D
July 23, 1962	52-109	24	40.90		A-57C
July 23, 1962	52-109	20		41.90	A-30
July 26, 1962	52-109	23	40.90		A-57C

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